Petition

81-5749

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SUPREME COURT, U.S.

No.

(A-206)

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ALPHONSO MORGAN,

Petitioner,

-against-

CHARLES MONTGOMERY, WARDEN,
GEORGIA STATE PRISON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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November 19, 1981.

QUESTIONS PRESENTED

1. Whether a defendant was constitutionally represented and heard before the appellate court that affirmed the death penalty imposed upon him where: (a) the court ignored defendant's statements that his state-appointed trial counsel had abandoned him and his requests for appellate counsel; (b) defendant's state-appointed trial counsel had to be ordered, under the threat of sanctions, to file, first, an enumeration of error and, then, a brief; (c) the brief of defendant's state-appointed counsel (only 11 pages in length) did not address the death penalty imposed upon defendant; (d) defendant's state-appointed counsel failed to appear for oral argument on the mandatory appeal; (e) the court not only heard ex parte oral argument from the state, but requested and received from the state an ex parte supplemental brief on the issue of the death penalty, without requesting such a brief from defendant; and (f) the record on appeal included not one single word written or spoken in defense of the condemned man's life?

2. Whether custodial statements that follow an unconstitutional warrantless arrest in a suspect's home are inadmissible fruit of the unlawful arrest?

3. Whether the death sentence was unconstitutionally imposed where (a) the death sentence was based solely on the aggravating circumstance described in Ga. Code Ann. § 27-2534.1(b)(7), and (b) the trial court's charge on that statutory aggravating circumstance was indistinguishable in all material respects from the charge found constitutionally inadequate in Godfrey v. Georgia, 446 U.S. 420 (1980)?

4. Whether the death penalty may constitutionally be imposed on the basis of jury instructions that (a) fail to instruct the jury to consider the characteristics of the defendant as well as the nature of the crime, (b) fail to explain the term "mitigating" or to direct the jury's attention to specific mitigating circumstances present in the case, and (c) suggest that the jury must decide in favor of death if it finds any aggravating circumstance?

5. Whether failure to transcribe the prosecutor's summations to the jury in a capital case deprives defendant of due process because it unnecessarily results in the record on appeal not disclosing all the considerations that motivated the jurors to impose the death sentence?

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In The

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October Term, 1981

ALPHONSO MORGAN,

Petitioner,

-against-

CHARLES MONTGOMERY, WARDEN,
GEORGIA STATE PRISON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner Alphonso Morgan seeks a writ of certiorari to review an order of the Supreme Court of Georgia entered on June 23, 1981. The order denied petitioner's application to appeal a decision of the Superior Court of Tattnall County, State of Georgia, denying a writ of habeas corpus. Petitioner is under sentence of death.

PRIOR OPINIONS

No opinion was rendered by the Supreme Court of Georgia. The order of the Supreme Court of Georgia denying petitioner's application for a certificate of probable cause to appeal, which is unreported, appears at A.07.* The judgment and order of the Superior Court of Tattnall County denying the petition for a writ of habeas corpus, which is unreported, appears at A.28-53.

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* References to the Appendix are cited as "A. ".

The opinion of the Supreme Court of Georgia affirming petitioner's conviction and sentence, and the opinion of three justices dissenting with respect to the death sentence, are reported at 241 Ga. 485, 246 S.E.2d 198 (1978), and appear at A.54 and A.59, respectively. This Court's decision denying certiorari to review the judgment of the Supreme Court of Georgia affirming petitioner's conviction and sentence is reported at 441 U.S. 967 (1979) (Brennan and Marshall JJ., dissenting). The Court's denial of the petition for a rehearing is reported at 444 U.S. 976 (1979) (Brennan, Stewart, Stevens, and Marshall, JJ., dissenting).

JURISDICTION

The order and judgment of the Superior Court denying the petition for a writ of habeas corpus was entered on March 27, 1981. A.28. The order of the Supreme Court of Georgia denying petitioner's application for a certificate of probable cause to appeal was entered on June 23, 1981. A.07. On September 1, 1981, petitioner applied for an extension of time to file this petition for a writ of certiorari to and including November 20, 1981. A.01. Mr. Justice Powell granted the application on September 8, 1981. A.06. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case presents issues under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, which are set forth at A.152. The Georgia statutory provisions involved are set forth at A.153.

STATEMENT OF THE CASE

The charge for which petitioner was convicted was that he acted in concert with Jose High and Judson Ruffin to murder James Gray on August 22, 1976. Petitioner was tried alone.

Petitioner. Petitioner is black and was 17 or 18 in August 1976. He had not completed high school. He had no prior criminal record.*

Petitioner's Appointed Counsel. State-appointed counsel had two years experience and did not specialize in criminal law. He did not make an opening statement at any stage of the proceedings. He put on no evidence during the sentencing stage of petitioner's trial. After his client was convicted and sentenced to death, he abandoned the case. Petitioner himself filed a notice of appeal. Five months later, petitioner's trial counsel had to be ordered by the Georgia Supreme Court to file an enumeration of error and a brief. He filed an 11-page brief that did not address the imposition of the death penalty. (Five pages of the brief

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* The arresting officer testified that petitioner said his age was 17 (HTr.139; TTr. 115); the Trial Judge's Report to the Georgia Supreme Court (see Ga. Code Ann. § 27.2537(a)) indicated that petitioner was born on "1/1/58", which would have made him 18. His education and lack of prior record were also shown by the Trial Judge's Report. (A.112, 116.)

References to "HTr." are to the transcript of the habeas corpus hearing below. References to "TTr." are to the transcript of petitioner's trial, which was Petitioner's Exhibit 1 in the habeas corpus hearing below. The entire record on appeal of petitioner's conviction and sentence, including the Trial Judge's Report, was admitted as Petitioner's Exhibit 2 at the habeas corpus hearing (HTr. 140).

A copy of the transcript of the habeas corpus hearing, together with all exhibits, is being filed with the Clerk of this Court. For convenience, some exhibits (including the Trial Judge's Report) have been reproduced in the Appendix.

consisted of a description of the trial, including nearly 3 pages of verbatim transcript.) Counsel did not attend oral argument. Thus, no one wrote or spoke so much as a word in defense of petitioner's life in the Georgia Supreme Court. After the Georgia Supreme Court decision affirming petitioner's conviction and sentence, his state-appointed counsel did nothing to assist him. It was not until petitioner, sitting in his prison cell, was given one week's notice that he would be electrocuted that petitioner was able to secure pro bono counsel, who secured leave to file an out-of-time petition for certiorari on petitioner's behalf in this Court.*

The Trial: Evidence Relating to Whether or Not Petitioner was Guilty. The only evidence implicating petitioner was his own statements.

J. B. Lykes, County Sheriff's investigator, testified that he, the Sheriff , a third-named officer, and "a

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* In his Report to the Georgia Supreme Court, the trial judge checked a box indicating that appointed counsel had less than five years experience, and that the nature of his practice was "general" (A.116). The Georgia State Bar records show he had been admitted for two years as of the date of trial. Counsel's lack of interest in petitioner's case is shown by petitioner's pro se notice of appeal (A.74), petitioner's letters to the authorities seeking counsel and a copy of the trial transcript (A.76-90, 122), the letter of the trial judge denying petitioner's request for counsel (A.123), the order of the trial court denying petitioner's request for a transcript (A.124), the Georgia Supreme Court's order to file enumerations of error and letter ordering counsel to file a brief or face sanctions (A.93-94), the 11-page brief filed by petitioner's appointed counsel, which did not address the death penalty (A.95), the letter of petitioner's pro bono counsel to the Clerk of this Court (A.128), and petitioner's affidavit regarding the timeliness of his petition for certiorari seeking review of the decision affirming his conviction and sentence (A.129). All these documents were part of the record on appeal admitted as Exhibit 2 below (HTr. 140). The court below found that counsel did not appear for oral argument on mandatory appeal of the death sentence (A.30-31).

number of other officers" arrested Morgan in his home at "daybreak" on August 28, 1976 (TTr. 108).

At a hearing held after the jury had been sent out, Morgan challenged the legality of his arrest and the voluntariness of the confession that ensued (TTr. 108-23). At the hearing, the substance of the police testimony was as follows:

Dykes testified that Jose High had been arrested when it was "just getting dark" on August 27, and at about 3:30 or 4:00 the next morning had implicated petitioner in the Gray murder (TTr. 111-12).*

The police proceeded to arrest Morgan in his home "immediately" after 3:30 or 4:00, or at "daybreak". They did not have, or seek, an arrest warrant. (TTr. 119-20.) Dykes said they feared Morgan would be gone when he found out High had been arrested (TTr. 112). But the police had the area "completely surrounded" (TTr. 119).

Dykes testified that Miranda warnings were read to Morgan in his house and in a car going down to the police station. Morgan said he knew nothing about the charges (TTr. 115).

By approximately 7:00 a.m., Morgan was in the county jail. Dykes, the Sheriff, and two other named police officers, with "other officers present", continued the interrogation of Morgan, without, said Dykes, using any threats or promises (TTr. 116-17). A confession apparently ensued--but

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* Dykes said the police concluded that the information in High's confession was "very reliable" (TTr. 112). He did not explain this answer, but presumably it referred to evidence involving High himself, as opposed to Morgan, because the state never introduced any evidence linking Morgan to the crime other than his own confession. Dykes also said that, at a lineup which included High, some unidentified person gave a name of "something like Alonzo" (TTr. 117).

there was no testimony during the hearing as to the circumstances immediately preceding the confession. Dykes testified that each time he attempted to transcribe the statements, Morgan would stop talking (TTr. 121).

At the conclusion of the hearing, the court ruled that a confession had been "prima facie" voluntarily made. The court declined to rule on whether the arrest had been illegal (thereby infecting the ensuing confession), stating that it was "not essential to my ruling on the question of the confession at this time". (TTr. 122-23.)

When the jury returned, the circumstances of the confession were described. For the first time, Dykes testified that he had deceived Morgan by telling him that his fingerprints were on a gun placed on the table before him, and that he had a photograph of Morgan's footprint at the crime scene. Dykes testified that Morgan then said, "All right, I was there. Jose made me shoot him. He's the only one I killed." (TTr. 128.)

Dykes--who conceded that he had no writing regarding the confession, and indeed that Morgan would "just quit talking" whenever he tried to take notes or tape record (TTr. 121, 133)--testified that petitioner had further admitted that High, Ruffin and he abducted the victim from his truck, placed him in the trunk of Ruffin's car, and took him to an airfield. There, High blindfolded the victim, and Ruffin and petitioner shot him (TTr. 131-32).

Only one witness was called by petitioner's counsel --an agent of the Georgia Bureau of Investigation originally scheduled to testify for the State (TTr. 196). The agent testified that on August 29 he had taken written notes of a

statement made by Morgan, which Morgan had signed.* Morgan told the agent that he was under threat of his life when he shot the victim:

> "Jose said to shoot him. I said I'm going to shoot--I said I'm not going to shoot. 'If you don't shoot him, kneel down and I'll shoot you and the man both.' Jose put the hand on my face, turned my head, and then I fired shotgun. He didn't die. I shot him in the shoulder. The Cowboy [Ruffin] shot him with double barrel shotgun one time. I saw the man's head bust open. I cried and went back to the car. Jose said, 'Don't cry like a baby. You're a grown man now. You're part of the family. If you tell the police, I'll kill you and your family.' Jose had man's wallet in his hand, then we left the Roadrunner and stopped at Church's Chicken on Gwinnett Street and talked. Jose laughed, then they took me home." (TTr. 202-203.)

Charge and Conviction. The court instructed the jury that coercion (a reasonable belief that an act was necessary to prevent imminent death or great bodily injury) would be a defense to any crime, except murder (TTr. 221).

The Sentencing Phase. Neither side introduced any additional evidence. Counsel for both sides argued to the jury, but their arguments were not transcribed (A.62).

The court's charge on punishment (A.62) was primarily devoted to discussion of "aggravating circumstances". The court told the jury that they could impose the death penalty if they found one of three possible statutory aggravating circumstances:

(i) the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind, or an aggravated battery to the victim";

(ii) the offense was committed in the course of

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* The agent said Dykes told him he had talked with Morgan but did not relate any statement by Morgan (TTr. 198-99).

another capital felony, armed robbery; or

(iii) the offense was committed for the purpose of receiving money (A.63).

The trial judge did not define any of the broad terms in the first above-quoted circumstance except for "aggravated battery", which was defined so broadly that the act of murder itself would constitute an "aggravated battery" (Id.)*

After an extensive treatment of the aggravating circumstances that would authorize the jury to find in favor of death, the trial judge did not tell the jurors either (i) that they should weigh "mitigating" against aggravating circumstances, or (ii) that they could vote for life imprisonment even if they found a statutory aggravating circumstance.

The trial judge also did not tell the jurors that in voting for death or life they must focus upon the defendant himself, as well as the crime. The trial judge did not tell the jurors that they could consider the defendant's age, his claim of mortal duress (which they had just been told was irrelevant to the issue of guilt for murder), or his lack of prior criminal record. The court did not explain the term "mitigating". The only mention of the legal term "mitigating" was in the midst of a sentence near the beginning of the charge, where the judge said, "You should consider all of the facts and circumstances of the case, including any mitigating or aggravating circumstances" (A.62).

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* The definition was: "maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring him, his body, or a member thereof" (A.63).

The three statutory aggravating circumstances were submitted to the jury in writing.

The jury's written verdict read:

> "We ask the death penalty for the offense of murder was outrageously and wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim." (A.67)

The trial judge ordered petitioner's electrocution to take place on August 17, 1977 (TTr. 233).

Petitioner's Appeal. On July 19, 1977, petitioner himself filed a handwritten notice of appeal, together with a request that counsel be appointed to represent him on appeal (A.74-78).

The request was ignored.

On November 21, 1977, the Supreme Court of Georgia ordered petitioner's counsel to file an enumeration of error by November 29, 1977, or face sanctions (A.88).

Shortly before December 19, 1977, petitioner wrote a three-page handwritten letter to the Georgia Supreme Court stating, among other things, that his appointed trial counsel had given him no report about his case (A.89). Still continuing to ignore petitioner's request for appellate counsel, the Georgia Supreme Court ordered petitioner's trial counsel to file a brief or face sanctions (A.94). The brief, filed on December 29, 1977, was only 11 pages and did not address itself at all to the death penalty imposed upon petitioner (A.95).

Oral argument was held on January 9, 1978. Petitioner's state-appointed trial counsel did not appear. No argument was made on petitioner's behalf. (A.30.) After hearing the state's argument, the court asked the state to file a supplemental brief addressing the adequacy of the

trial court's sentencing charge and, in particular, its treatment of mitigating and aggravating circumstances. Neither Morgan nor his counsel was asked to file a brief on that crucial issue. (A.36-37, 109.)*

By statute, the trial judge in capital cases is supposed to prepare answers to a questionnaire about defendant, the offense, and the circumstances of the trial, and to send it to the Georgia Supreme Court with the record. Ga. Code Ann. § 27-2537(a). Although the record in petitioner's case went to the state supreme court on October 17, 1977, the trial judge's report was not even filled out until March 27, 1978--almost three months after the ex parte oral argument (A.118-121). In his report, the trial judge told the supreme court that there were no "mitigating circumstances" present in petitioner's case, even though the questionnaire form itself specified as possible mitigating circumstances "youth", "duress", and lack of prior criminal activity (A.114-15).** Petitioner was not advised of this report or accorded an opportunity to respond to it.

Since petitioner's trial counsel had introduced no evidence during the sentencing phase of the trial, and since

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* The Superior Court, in denying the writ of habeas corpus, stated that "a copy of the [state's] supplemental brief was sent to the Petitioner's counsel prior to the sending of the [state supreme court's] decision", without specifying when or how it was sent. The record does not indicate that the brief was ever sent, but, in any case, as the Superior Court found, petitioner's appointed counsel was not asked to, and did not, respond to the state's brief. (A.36-37.)

** The record plainly showed defendant's youth and his contention of duress, and did not show any history of prior criminal activity. In other parts of the questionnaire, the trial judge himself reported that defendant had no record of prior convictions, that he had been born "1/1/58", that he had not finished high school, and that he had only a "medium" ("IQ 70-100") intelligence level (A.112).

counsel's arguments to the jury had not been transcribed, the record on mandatory appeal to the Georgia Supreme Court included not one single word written or uttered in defense of petitioner's life.

On June 28, 1978, the Georgia Supreme Court issued its opinion affirming petitioner's conviction and death sentence. The official reporter shows petitioner as having represented himself pro se, in addition to the appointed trial counsel who had abandoned him (A.54).

Petitioner never heard from his state-appointed trial counsel again. On or about January 30, 1979, in his prison cell, he was informed that he would be executed on February 7, 1979. Thereafter, petitioner was able to secure pro bono counsel. Mr. Justice Powell stayed the execution and granted leave to file an out-of-time petition for certiorari in this Court. That petition was denied, 441 U.S. 967 (1979) (Brennan and Marshall, JJ., dissenting), as was the petition for a rehearing, 444 U.S. 976 (1979) (Brennan, Stewart, Stevens and Marshall, JJ., dissenting).

Petitioner's habeas corpus petition was denied by the Superior Court of Tattnall County on March 27, 1981 (A.28). Petitioner's application for a certificate of probable cause to appeal was denied by the Georgia Supreme Court on June 23, 1981 (A.07).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW*

Each of the Federal questions presented by this

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* Not all of the Federal claims raised in petitioner's application to the Supreme Court of Georgia have been raised herein. Limitation of the claims presented in this petition to those clearly within the scope of this Court's Rule 17 is not intended to be, and should not be viewed as, a waiver of petitioner's right to pursue in other forums Federal claims not raised herein. Fay v. Noia, 372 U.S. 391 (1963).

petition was raised in the petition for a writ of habeas corpus in the Superior Court, which held that:

(i) the failure of petitioner's state-appointed counsel to file briefs and appear for oral argument, and the state supreme court's decision to hear ex parte oral argument and solicit an ex parte brief from the state, did not violate petitioner's constitutional rights (A.29-30, 36-37);

(ii) the claim that a purported confession was unconstitutionally admitted into evidence had been determined against petitioner on direct appeal and could not be considered on a petition for habeas corpus (the court took no notice of the fact that this Court's decision in Payton v. New York, 445 U.S. 573 (1980), cited by petitioner, was rendered after the Georgia Supreme Court had affirmed his conviction and sentence) (A.42-43);

(iii) the death sentence imposed upon petitioner was not unconstitutional under this Court's decision in Godfrey v. Georgia, 446 U.S. 420 (1980) (A.38-40);

(iv) the claim that the death sentence was unconstitutionally imposed on the basis of inadequate jury instructions had been decided by the state supreme court and could not be reviewed on a petition for habeas corpus (A.40-41); and

(v) the failure to transcribe the prosecutor's summation to the jury did not violate petitioner's constitutional rights (A.37-38).

Each of the Federal questions presented by this petition was raised in petitioner's application to the Georgia Supreme Court for a certificate of probable cause

to appeal.* In denying that application, the Georgia Supreme Court necessarily decided all questions adversely to petitioner.

REASONS FOR GRANTING THE WRIT

The mandatory appeal of all death sentences has been held to be a constitutionally vital stage in the statutory scheme which this Court found constitutional in Gregg. This petitioner effectively was unrepresented and unheard at that stage. His state-appointed counsel had to be ordered by the Georgia Supreme Court to file, first, an enumeration of error and, then, a brief. He filed an 11-page brief that did not address the issue of the death penalty. He did not appear for oral argument. The state supreme court went ahead and heard ex parte argument on petitioner's conviction and death sentence, and requested and received a supplemental brief from the state on the sentence. The court requested nothing from the condemned man, and indeed, did not even notify him that it was giving the state a further opportunity to urge his execution. Three months after the ex parte argument--and before it rendered its decision--the state supreme court received the belated report of the trial judge, which erroneously stated that there were no mitigating circumstances present in petitioner's case. Petitioner was given no opportunity to review or respond to the report.

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* The failure of state-appointed counsel to put on evidence during penalty stage, file briefs or appear for oral argument, and ex parte oral argument and briefing before state supreme court (A.10-12); the purported confession unconstitutionally admitted into evidence (A.18-19); the death sentence unconstitutionally imposed under Godfrey (A.16-17); the death sentence imposed on the basis of constitutionally inadequate jury instructions (A.14-15); the failure to transcribe summations to the jury (A.12-13).

A clearer violation of the rights to be represented and heard is difficult to imagine. On this ground alone, the Court should grant certiorari and reverse the state supreme court's decision to allow petitioner's conviction and sentence to stand.

In Payton v. New York, 445 U.S. 573 (1980), this Court held that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home for the purpose of making a routine felony arrest. Petitioner's arrest was unconstitutional under Payton. The direct fruit of that unlawful arrest--a purported custodial confession--should have been ruled inadmissable.

In Godfrey v. Georgia, 446 U.S. 420 (1980), decided six months after denial of the petition for a rehearing in Morgan v. Georgia, 444 U.S. 976 (1979) (Brennan, Stewart, Stevens, Marshall, JJ., dissenting), this Court held that jury instructions that do no more than repeat the bald language of Ga. Code Ann. § 27-2534.1(b)(7) result in "[t]he standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury", 446 U.S. at 429; accord, id. at 437 (Marshall, J.). The jury instructions on § (b)(7) in this case are indistinguishable from those in Godfrey. This ground, standing alone, warrants certiorari and reversal of the decision below insofar as it leaves petitioner's sentence of death standing.

At least since the first Mr. Justice Harlan's opinion in Calton v. Utah, 130 U.S. 83 (1889), this Court has stressed the "fundamental" point that our nation will not use its courts to take life unless the decision is guided by

clear instructions and standards, id. at 87. Yet, in this case, as in many other cases, the Georgia Supreme Court has approved the imposition of death by juries that can only be described as uninstructed, and has failed entirely to articulate standards necessary to minimize the risk of arbitrary and capricious imposition of death. This failure unnecessarily invites--and indeed assures--different sentencing dispositions in similar cases, thereby "introduc[ing] a level of uncertainty and unreliability into the fact-finding process that cannot be tolerated in a capital case", Beck v. Alabama, 447 U.S. 625, 642-43 (1980).

The failure to transcribe the prosecutor's summations necessarily means that the record cannot "disclose to the reviewing court the considerations which motivated the death sentence", something which this Court has found to be important "in every case in which [the death penalty] is imposed", Gardner v. Florida, 430 U.S. 349, 361 (1977.)

I. A CONDEMNED MAN MUST BE REPRESENTED AND HEARD BEFORE A TRIBUNAL CHARGED WITH DETERMINING WHETHER HE SHOULD LIVE OR DIE. PETITIONER WAS NEITHER REPRESENTED NOR HEARD.

In 1932--more than thirty years before the general rule of Gideon--this Court held that the accused in a capital case "requires the guiding hand of counsel at every step in the proceedings against him", Powell v. Alabama, 287 U.S. 45, 68-69 (1932). The Court held also that there must be an "effective appointment" of counsel, id. at 71 (emphasis added). The right to counsel continues through the appeal of a state criminal conviction, Douglas v. California, 372 U.S. 353 (1963). A fortiori, the right to counsel continues through the constitutionally mandatory appeal of a capital

case, particularly since, as this Court has often stated, "there is a significant constitutional difference between the death penalty and lesser punishments", Beck v. Alabama, 447 U.S. at 637.

Here, the state supreme court knew that petitioner, rather than counsel, had filed his notice of appeal (A.74), and that petitioner had asked for new counsel to be appointed (A.76, 88). It ignored that request. The court knew that it had to order petitioner's state-appointed counsel, first, to file an enumeration of error (A.88) and, then, to file a brief (A.94). The court knew that counsel's brief (only 11 pages in length) did not address the death sentence imposed upon petitioner at all (A.95), and that counsel did not even appear for oral argument (A.30-31).

On those facts alone, petitioner was denied representation and the right to be heard at a stage that this Court has held is a constitutionally vital part of the Georgia scheme, Gregg v. Georgia, 428 U.S. 153, 198, 201 (1976) (plurality opinion); id., 222-23 (opinion of Mr. Justice White). See Godfrey v. Georgia, 446 U.S. at 445-46 (opinion of Mr. Justice White).

In addition, however, the state court here not only went ahead and heard ex parte argument from the state on petitioner's conviction and sentence, but also asked for and received an ex parte supplemental brief from the state on a question that would determine whether petitioner should live or die. The court did not request such a brief from petitioner, or even notify him of the request. (A.36-37, 109.) The court, moreover, received a belated report from the trial judge (three months after the ex parte argument and prior to

its own decision) stating, among other things, that there were no mitigating circumstances present in petitioner's case. In fact, the record showed petitioner's youth, his lack of prior record, and the evidence that he was under duress at the time of the crime. (A.112-121.) Petitioner was afforded no opportunity to respond or even to know that the trial judge's belated report was being submitted.

Finally, since counsel's summations to the jury at trial were not transcribed (A.62), it may fairly be said that the state supreme court affirmed petitioner's sentence without hearing or reading one single word uttered in defense of his life.

Petitioner's conviction and sentence were obtained in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. On this issue summary reversal would be an appropriate disposition.

II. PETITIONER'S CUSTODIAL STATEMENTS WERE INADMISSIBLE IN THAT THEY WERE TAINTED BY HIS UNLAWFUL ARREST AND WERE INVOLUNTARY. THE FAILURE OF THE TRIAL COURT TO HOLD A FULL AND FAIR HEARING ON THE ADMISSIBILITY OF HIS POST-ARREST STATEMENTS DENIED PETITIONER DUE PROCESS OF LAW.

Petitioner was arrested in his home around daybreak. The police neither had, nor sought, an arrest warrant.* There were no exigent circumstances; the police had petitioner's home "completely surrounded" and had sufficient time

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* The arrest also was made without probable cause. The bare conclusory statement that High's information was reliable was insufficient to establish probable cause. Spinelli v. United, 393 U.S. 410, 416 (1969); Aguilar v. Texas, 378 U.S. 108, 114 (1964). Moreover, High's information was not shown to be the fruit of a lawful arrest. Wong Sun v. United States, 371 U.S. 471, 488 (1963).

to test their right to arrest before a neutral magistrate, Coolidge v. New Hampshire, 403 U.S. 443 (1971). Thus, there was "a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest", prohibited by the Fourth and Fourteenth Amendments. Payton v. New York, 445 U.S. 573, 576 (1980).

Petitioner's custodial statements to the police were the fruit of his unlawful arrest and should have been ruled inadmissible. Brown v. Illinois, 422 U.S. 590, 604-605 (1975); Wong Sun v. United States, 371 U.S. at 484. The trial court ruled that petitioner's statements were voluntary, but erroneously declined to rule on the legality of the arrest (TTr. 122-23). The mere finding that the statements were voluntary cannot dissipate the taint of the unlawful arrest. Brown v. Illinois, 422 U.S. at 604.

Petitioner contends that in any event his statements were involuntary and that he was denied his right to the full and fair hearing which would have shown them to be involuntary. Lego v. Twomey, 404 U.S. 477 (1972); Jackson v. Denno, 378 U.S. 368 (1964).

First, the court improperly excluded crucial testimony as to voluntariness suggesting that petitioner did not understand that his oral statements could be used against him. The court precluded cross-examination as to the reason petitioner refrained from making further statements each time Officer Dykes attempted to transcribe petitioner's statements. (TTr.121.)

Second, the court cut short the hearing before the circumstances surrounding the confession were even discussed. The fact that the police had deceived petitioner by stating

that his fingerprints were on the murder weapon and that his footprints were found at the crime scene was not revealed until after the confession had been ruled admissible. (TTr. 122-128.) Although not controlling, deception is a relevant factor that must be considered in a voluntariness determination. See Frazier v. Cupp, 394 U.S. 731, 739 (1969); Schmidt v. Hewitt, 573 F.2d 794 (3d Cir. 1978); see also Lisenba v. California, 314 U.S. 219, 237 (1941).

Third, in holding the confession voluntary on the basis of the truncated hearing, the court improperly took no account of petitioner's youth and intelligence, e.g., Haley v. Ohio, 332 U.S. 596, 600-601 (1948), or the daybreak interrogation by a group of police officers, e.g., Spano v. New York, 360 U.S. 315 (1959).

III. PETITIONER'S CASE IS INDISTINGUISHABLE FROM GODFREY. FOR THAT REASON, THE DECISION OF THE STATE COURTS ALLOWING HIS DEATH SENTENCE TO STAND MUST BE REVERSED.

In Godfrey v. Georgia, 446 U.S. 420 (1980)--decided shortly after the denial of certiorari in petitioner's challenge of the sentence imposed on him--this Court held that a death sentence based upon a finding of the aggravating circumstance defined by Ga. Code Ann. §27.2534.1 (b)(7) cannot stand consistently with the Eighth and Fourteenth Amendments unless a limiting construction is placed upon § (b)(7) both by the jury instructions at trial and by the Georgia Supreme Court in its mandatory sentence review.

Petitioner's case is indistinguishable from Godfrey, and therefore, the decision below, to the extent that it leaves standing the death penalty imposed upon petition, must be reversed.

A. As in Godfrey, the Trial Court's Instructions to the Jury on the § (b)(7) Aggravating Circumstance Were Constitutionally Inadequate.

The jury instructions at issue here, and those at issue in Godfrey v. Georgia, 446 U.S. 420 (1980), are set forth at A.62 and A.68, respectively. With respect to the instruction on the § (b)(7) aggravating circumstance, the two charges are in all material respects indistinguishable. In Godfrey, the trial judge charged the jury as follows with respect to the § (b)(7) aggravating circumstance:

> "[Y]ou may consider any of the following aggravating circumstances which may be supported by the evidence. That the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." A.68.

In petitioner's case, the trial judge stated:

> "With respect to the offense of murder, [the aggravating circumstances you may consider] are: . . . the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, or depravity of mind, or an aggravated battery to the victim. Now, an aggravated battery is when one maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring him, his body, or a member thereof. . . ." A.63.

Both in Godfrey and in petitioner's case, the jury returned with death verdicts predicated upon § (b)(7) alone.*

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* The jury in Godfrey stated that the offense was "outrageously or wantonly vile, horrible and inhuman", 446 U.S. at 426, whereas the jury in petitioner's case stated that the offense was "outrageously and wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim" (A.67).

The difference in form of the two verdicts is of no consequence here. In both cases, "[a] person of ordinary sensibility could fairly characterize almost every murder" as falling within the jury's description and, if they subscribed to such a view, "their preconceptions were not dispelled by the trial judge's sentencing instructions", which "gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms". Godfrey v. Georgia, 446 U.S. at 428-29.

As in Godfrey, the sentencing instructions in petitioner's case

> "gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation".

446 U.S. at 429.* Here, as in Godfrey, the trial court's charge led to "the standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury". Id.

B. As in Godfrey, Appellate Review in No Way Cured the Standardless and Unchannelled Imposition of Capital Punishment by the Jury.

On mandatory appeal in petitioner's case, as in Godfrey, no narrowing construction was placed upon § (b)(7) by the state supreme court. The state court's review of the verdict was as perfunctory as that in Godfrey, 446 U.S. at 427; it held simply that the § (b)(7) aggravating circumstance was "supported by the evidence", without further discussion (A.58). Not only did the state supreme court not place a limiting construction on § (b)(7), it did not even discuss the language of § (b)(7). Thus, as in Godfrey, "[t]he standardless and unchanneled imposition" of capital punishment was "in no way cured by the affirmance" of the sentence by the state supreme court, 446 U.S. at 429.

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* The fact that the trial judge in petitioner's case included a definition of "aggravated battery" does not mitigate the charge's shortcomings, and indeed, exacerbates them because, as this Court noted in Godfrey, 446 U.S. at 423:

> "'It is, of course, arguable that any murder involves depravity of mind or an aggravated battery.' [Gregg v. Georgia, 428 U.S. at 201 (opinion of Stewart, Powell and Stevens, JJ.)]".

Indeed, given that the affirmance was based entirely upon ex parte argument by the state (see Point I, supra), petitioner's case is more compelling than Godfrey's.

C. As in Godfrey, There Is No Evidentiary Support in Petitioner's Case for a Finding That the Offense Falls Within a Properly Narrow Construction of Section (b)(7).

The only evidence that implicated petitioner was his own statements. Those statements indicated that petitioner (i) was forced to shoot at the victim under threat of being murdered himself, (ii) cried when he saw the victim shot in the head by Ruffin and (iii) was told that he was "a grown man now" and that he and his family would be killed if he went to the police. That evidence does not justify a finding either that the defendant engaged in "serious physical abuse of the victim before death" or that the defendant possessed a "mental state that led him . . . to torture or commit an aggravated battery before killing his victim", 446 U.S. at 431.* In fact, the evidence directly contradicts such findings.

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* In his report to the Georgia Supreme Court pursuant to Ga. Code § 27.2537(a), the trial judge in petitioner's case answered "yes" to the question: "Was the victim physically harmed or tortured?" But when asked to state the "extent of harm or torture", the trial judge answered simply: "Death". (A.115.) Compare Godfrey v. Georgia, 446 U.S. at 426.

The infliction of death itself cannot constitute the "torture" necessary to satisfy the § (b)(7) aggravating circumstance. If it could, then the statutory scheme would not distinguish the few cases "in which the death penalty was imposed from the many in which it was not". Id., 446 U.S. at 433. The fact that the trial judge himself labored under the misapprehension that death itself could constitute "torture" demonstrates that the charge in this case, as in Godfrey, "gave the jury no guidance". Id. at 429.

D. In Any Event, Appellate or Collateral Analysis Is Irrelevant to the Question Whether the Trial Court's Charge on Section (b)(7) Was Constitutional.

A narrowing construction placed upon § (b)(7) on appellate or collateral review, even if offered (which it was not), would not cure the deficiency in the trial court's charge. See, e.g., Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965); Presnell v. Georgia, 439 U.S. 14 (1978). Even if it appeared that the necessary elements of the §(b)(7) aggravating circumstance were present in petitioner's case (which it does not), the most that could be said is that if the jury had been constitutionally instructed, it might properly have sentenced petitioner to death. But petitioner here, like Godfrey, was constitutionally entitled to have a properly instructed jury decide whether he should be punished by death.

It should be noted that, since this Court's decision in Godfrey, the Georgia Supreme Court still has not taken the opportunity, in any case, to examine the sufficiency of a trial court's instructions on § (b)(7), or to give the state's trial courts any guidance on instructing a jury in accordance with Godfrey. Rather, in every relevant case decided since Godfrey, including the cases remanded by this Court, the state court has confined its review to the question whether the evidence in the record sustained a jury finding of the § (b)(7) aggravating circumstance. See the table of relevant cases at A.133-34. This approach simply avoids the problem of "the standardless and unchanneled imposition of death sentences" identified in Godfrey, 446 U.S. at 429.

Certiorari should be granted and the decision below, to the extent that it leaves standing the death sentence imposed on petitioner, reversed.

IV. THE DEATH PENALTY MAY NOT CONSTITUTIONALLY BE IMPOSED WHERE THE TRIAL COURT'S INSTRUCTIONS DO NOT ACCURATELY APPRISE THE JURY OF ITS DUTY TO CONSIDER MITIGATING CIRCUMSTANCES.

It is "quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations", Gregg v. Georgia, 428 U.S. 153, 193 (1976). The state "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death' [citations omitted]". Godfrey v. Georgia, 446 U.S. at 428. In capital cases, moreover, as this Court recognized long before its wider rulings in Furman v. Georgia, 408 U.S. 238 (1972), doubts about the clarity of instructions should be "resolved in favor of the accused", Andres v. United States, 333 U.S. 740, 752 (1948). See also Calton v. Utah, 130 U.S. 83, 87 (1889) ("fundamental" in cases involving death that instructions be clear and explicit). While all criminal defendants are entitled to instructions clear to laypersons as well as legal scholars, Taylor v. Kentucky, 436 U.S. 478, 484 (1978), it is particularly true in capital cases that instructions should be expressed (as Mr. Justice Frankfurter put it) in clear, "simple, colloquial English", and (as then Chief Judge Cardozo wrote) given "directly and not

in a mystifying cloud of words".*

The instructions approved by the Georgia courts in petitioner's case do not pass these tests. More specifically, they depart in three separate but reinforcing respects from requirements of the Georgia statutory scheme which this Court in Gregg held saved that scheme from constitutional attack.

A. The Jury Was Not Told That Its Decision On Life or Death Must Include Focus on the Particular Characteristics of the Defendant, as Well as Those of the Crime.

The instructions leading to the death verdict against petitioner include not one word about the need to consider the defendant's particular characteristics. Thus, they conflict with:

(i) Gregg and the other 1976 decisions holding that certain death penalty statutes can, if properly administered to focus on the individual defendant, meet the requirements of the Constitution;**

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* The first quote is from the concurring opinion in Andres, 333 U.S. at 766; the second is from Law and Literature (1931) cited in McGautha v. California, 402 U.S. 183, 199 (1971).

** E.g.:

(i) In Gregg, this Court emphasized the constitutional obligation to focus specifically on the defendant in at least six places in the plurality opinion, 428 U.S. at 189-90, 190, 192, 197, 199 and 206;

(ii) In Jurek v. Texas, this Court upheld the statute because it "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death", 428 U.S. 262, 274 (emphasis added);

(iii) In Profitt v. Florida, the statute was held constitutional in part because the sentencing authority must "focus" on "the circumstances of each individual homicide and individual defendant", 428 U.S. 242, 258.

(ii) Woodson and the other 1976 decision holding mandatory death penalty statutes unconstitutional because they exclude consideration of mitigating factors and the circumstances of the defendant;* and

(iii) Lockett v. Ohio, 438 U.S. 586 (1978), which held that in death cases the sentencing authority must be given a "full opportunity" to consider "mitigating circumstances", including "any aspect of the defendant's character and record". Id. at 17.

B. The Term "Mitigating" Was Not Defined for the Jury and Concrete Examples of Mitigating Circumstances Were Not Provided.

Buried in the first paragraph of the charge in petitioner's case is one blind reference to the word "mitigating" (A.62).

To slip into one sentence the single word "mitigating", without any explanation whatever, is to give no "direction" or "guidance" at all--and certainly falls far short of the "specific and detailed guidance", clear to laypersons as well as legal scholars, that is constitutionally required.

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* See:

(i) Woodson v. North Carolina, 428 U.S. 280, 304 (1976) ("a process that accords no significance to relevant facets of the character and record of the individual offender" is unconstitutional because it excludes from consideration the possibility of "compassionate or mitigating factors stemming from the diverse frailties of humankind");

(ii) Roberts v. Louisiana, 428 U.S. 325, 333-34 (1976) ("no meaningful opportunity" for "consideration of mitigating factors" presented by "the particular crime or by the attributes of the individual offender").

Even had the word been emphasized rather than buried, the legal term "mitigating" is not likely to be understood by a jury of laypersons. In contrast to the charge in petitioner's case, with its obscure one word legalism, the charges in both Gregg and Godfrey included an explicit definition of the term "mitigating".*

In addition, this Court's decisions--and a fair reading of the Constitution--call for more than a definition of the term "mitigating". They require that particular mitigating factors, relevant in light of the record, be specifically called to the jury's attention as examples of what they can weigh against the statutory aggravating circumstances which the court does call to the jury's attention.

Here, there were at least three such factors--Morgan's youth, his claim that he shot Gray because of duress (High's threat to kill him if he did not), and his lack of a prior criminal record.**

The Georgia statute states flatly that the trial judge "shall include" in his instructions "any mitigating circumstances". Ga. Code Ann. § 27-2534.1. In upholding the Georgia scheme, this Court repeatedly assumed that the Georgia trial courts would do so. Gregg v. Georgia, 428 U.S.

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* The juries in both Gregg and Godfrey were told that the term covered circumstances "which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or punishment". Record, Gregg v. Georgia, Trial Transcript at 480; Record, Godfrey v. Georgia, Trial Transcript at 577-79 (A.68). See Coker v. Georgia, 433 U.S. 584, 590-91 (1977).

** Footnote 44 in Gregg sets forth, inter alia, the proposed mitigating circumstances from the Model Penal Code, which include as items (a), (f) and (g) the items that should have been specifically included here for petitioner's jury to "consider". 428 U.S. at 193-94.

at 164, 192, 193, 194 n.44, 197. Indeed, in one of the many passages which state that the jury's attention must be "focused on the characteristics of the person who committed the crime" (point A supra), this Court gave examples of what it expected the jury's attention to be "focused" upon. Those included factors present in this case--i.e., whether the defendant had "a record of prior convictions for capital offenses", and "any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth . . . .)". Id. at 197. It should be noted, moreover, that the Georgia statute requires that the aggravating circumstances be submitted to the jury in writing--a provision that was adhered to in petitioner's case (A.64).

The need to make some reference to the additional mitigating circumstance present here--petitioner's claim of duress--was particularly compelling because the trial judge had just finished telling the jury in his instructions that duress was irrelevant to the question whether petitioner was guilty of murder (TTr. 221).*

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* That focus upon mitigating circumstances can make a life or death difference is evident from the following analysis of the pool of cases available to the Supreme Court of Georgia for comparison purposes at the end of 1977:

(i) 36 of the 48 offenders for whom either youth, or lack of a prior criminal record was reported as a mitigating factor by the trial judge (where the death penalty was imposed), or by the court's assistant (where it was not), received life sentences (A.135-137);

(ii) the two offenders for whom both youth and no prior record were reported received life sentences, despite the fact that in both cases (Sanders v. State, 235 Ga. 425, 219 S.E.2d 768 (1975) and Stovall v. State, 236 Ga. 840, 225, S.E.2d 292 (1976)) the offenders were found guilty of brutal murders;

(iii) there were no cases where youth, no record, and evidence of duress are reported.

Yet, the Georgia Supreme Court flatly has held that it is not only unnecessary for jury instructions to mention specific mitigating circumstances, but also unnecessary for jury instructions to even mention the word "mitigating" or its equivalent. Spivey v. State, 241 Ga. 477, 246 S.E.2d 288 cert. denied, 439 U.S. 1039 (1978). In so doing, the Georgia court purported to rely upon this Court's decision in Jurek v. Texas, 428 U.S. 262 (1976). But the Texas scheme considered in Jurek is significantly different from Georgia's, and the difference makes constitutionally fallacious the reasoning of the Georgia court. Under the Texas statute, the questions which a sentencing jury must answer necessarily focus attention upon "particularized mitigating factors", and the scheme thus "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender". Id. at 272, 274 (emphasis supplied). The Georgia scheme does not do so, absent instructions of the sort present in Gregg and Godfrey, but lacking here.*

The Georgia Supreme Court's decision in Spivey, which remains the standard for jury instructions in Georgia and was explicitly cited in affirming the death sentence

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* In the course of looking for a case arising in another jurisdiction with a different statutory scheme, the Georgia court would have found more relevant enlightenment in Profitt v. Florida, 428 U.S. 242 (1976), where the procedures were characterized by this Court as "like" Georgia's, id. at 251, 259. There, Furman was said to be satisfied because the sentencing authority's discretion would be "guided and channelled" by requiring examination of "specific factors that argue in favor of or against imposition of the death penalty", and by requiring "focus" on the "individual characteristics" of "each defendant" as well as the particular crime, id. at 258.

imposed on this petitioner (A.57), is based on a clear misunderstanding of this Court's decision in Jurek. Certiorari should be granted to address this fundamental problem.

C. The Jury Also Was Not Informed That It Should Weigh "Mitigating" Against Aggravating Circumstances.

Apart from not defining the legalism "mitigating" or providing particularized examples, the jury instructions in petitioner's case were also constitutionally deficient in that the jury was not specifically informed that it should weigh mitigating against aggravating circumstances. In contrast, under the Model Penal Code referenced in Gregg, and under the Florida statute approved in Profitt, the sentencer is specifically informed that it should weigh mitigating against aggravating circumstances, 428 U.S. at 248-251, 258. Similarly, under the Texas statute considered in Jurek, the question which a jury must answer before imposing the death sentence necessarily requires such balancing, 428 U.S. at 272, 274. This Court has assumed that such an instruction is required under the Georgia statute, Coker v. Georgia, 433 U.S. 584, 589-91 (1977).

While a particular form of words may not constitutionally be required, surely it is required that the jury be told in some form that it should weigh mitigating against aggravating circumstances.

D. The Jury Also Was Not Told That It Could Impose a Life Sentence Even If It Found a Statutory Aggravating Circumstance. Indeed, the Charge Suggested It Could Not.

Most of the charge in petitioner's case was devoted to a discussion of possible statutory aggravating circumstances--

at least one of which must be found before a jury is authorized to consider imposing the death penalty. Ga. Code Ann. § 27-2534.1(c). But the trial judge did not tell the jury that even if it found such a circumstance it could nontheless decide to impose a life sentence.

This particular deficiency was emphasized by the three justices who dissented from the Georgia Supreme Court's affirmance of petitioner's sentence (A.59-61).*

The charge approved by the state courts here departs from Gregg (where the jury was properly informed),** and ignores the statutory scheme which this Court held constitutional.† Indeed, the charge approved below turns

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* In his dissenting opinion in Godfrey, Mr. Justice White noted that the Georgia Supreme Court had "held that jurors must be instructed that they can impose a life sentence even though they find the existence of a statutory aggravating circumstance, Fleming v. State, 240 Ga. 142, 240 S.E. 2d 37 (1977)", 446 U.S. at 453. The state's reliance on that decision in Godfrey, where the jury was properly instructed, should haunt it in petitioner's case. The fact that the state supreme court has articulated the proper standard in Fleming carries no weight where the standard has not been applied, as was the case here and frequently elsewhere (see Point E infra).

** In Gregg, the trial judge first defined the relevant statutory aggravating circumstances, then said that, if one was found, the jury could "consider" imposing a death sentence, and then told the jury it should consider aggravating and mitigating circumstances (defining the term and giving examples) in actually making its decision. Record, Trial Transcript at 458, 478-80.

Similarly, the trial judge in Godfrey specifically instructed the jury to consider mitigating circumstances, defined the term "mitigating" and told the jury that it could impose a life sentence even if it found a statutory aggravating circumstance (A.68).

† Ga. Code Ann. § 27-2503(b) specifically requires that, after "appropriate instructions", the jury shall determine whether any mitigating or aggravating circumstances exist, and it then adds: "and whether to recommend mercy for the defendant".

Georgia's statute into an unconstitutional mandatory death sentence scheme whenever a jury concludes that one of the statutory aggravating circumstances is present. See Woodson v. North Carolina; Roberts v. Louisiana, supra.

E. The Failure of the Georgia Supreme Court To Give Guidance to the State's Trial Courts on Jury Instructions Has Created a Substantial and Unnecessary Risk That Similarly Situated Defendants Will Not Receive Similar Penalties.

A state's capital punishment scheme simply cannot be constitutional if the state's highest court does not exercise its role in assuring that defendants facing the death penalty are judged by juries instructed, as nearly as possible, in a consistent manner. Where some juries are "carefully and adequately guided in their deliberations", Gregg v. Georgia, 428 U.S. at 193, while others are not, there is a substantial and wholly unnecessary risk that similarly situated defendants will not receive similar penalties. The lesson of Furman and all that has followed is that, where a state's capital punishment scheme creates such a risk, the imposition of the death penalty is unconstitutional. See Beck v. Alabama, 447 U.S. at 638, 643.

That is precisely what has happened in Georgia.

The Georgia Supreme Court has not given the guidance to the state's trial courts necessary to assure reasonable consistency in the way juries are instructed. Indeed, by its decisions on the adequacy of charges, it has assured that juries will be instructed in widely variant ways, and thus, introduced an unnecessary level of "uncertainty and unreliability" into sentencing. Id. at 643.

As discussed above (at 23), since this Court's decision in Godfrey, the state supreme court has failed to articulate standards or even address the issue of how to instruct a jury in accordance with this Court's holding on the § (b)(7) aggravating circumstance.

The Georgia court has failed similarly with respect to this Court's holdings on the constitutional requirement that juries be adequately instructed concerning the relevance of mitigating circumstances.

In six decisions rendered between November 8, 1977, and May 16, 1978, before its decision affirming petitioner's death sentence, the Georgia Supreme Court held that it was error not to instruct a jury explicitly that it could return a life sentence even if it found a statutory aggravating circumstance.* Yet, shortly thereafter, the court retreated, and held that a simple direction to consider "all the facts and circumstances" in a case is, standing alone, sufficient to advise a jury of its duty to consider mitigating circumstances. Spivey v. State, 241 Ga. 477, 246 S.E.2d 288, cert. denied, 439 U.S. 1039 (1978).**

On direct mandatory appeal of the sentence in petitioner's case, 3 of the 7 justices of the Georgia Supreme Court found that the trial court's charge did not even meet the constitutionally inadequate Spivey standard. The majority

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* Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977); Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977); Spraggins v. State, 240 Ga. 759, 243 S.E.2d 20 (1978); Redd v. State, 240 Ga. 753, 243 S.E.2d 16 (1978); Lamb v. State, 241 Ga. 10, 243 S.E.2d 59 (1978); Davis v. State, 240 Ga. 763, 243 S.E.2d 12 (1978).

** The Georgia court explicitly reiterated that holding in Davis v. State, 241 Ga. 376, 247 S.E.2d 45 (1978), cert. denied, 439 U.S. 947 (1978), and Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92 (1978), cert. denied, 439 U.S. 991 (1978).

cited Spivey in affirming petitioner's death sentence, and the Georgia courts continue to cite it, without discussion, as the standard of clarity in death sentence cases. Indeed, in the recent case of Zant v. Gaddis, 247 Ga. 717, 279 S.E.2d 219 (1981), the state supreme court reversed a finding by a trial court that an instruction such as the one given in Spivey was inadequate, holding (279 S.E.2d at 222):

> "It is also [not] necessary to include the magic words 'mitigating circumstances' in the charge. Spivey v. State, supra. 'When Georgia juries are instructed in sentencing to consider all the facts and circumstances which have appeared at both phases of the trial, this necessarily includes any mitigating circumstances which defendant has shown, or argued, or both'. Spivey v. State, supra at 481."

The profound constitutional vice in the Spivey standard is clear. It violates the principal that "juries be carefully and adequately guided in their deliberations", which this Court has described as "quite simply a hallmark of our legal system", Gregg v. Georgia, 428 U.S. at 193. Our nation does not permit people to be convicted of petty crimes, let alone sentenced to death, on the basis of a supposition that juries have the power of clairvoyance. Jury instructions must be "specific and detailed", clear even to laypersons, and given "directly and not in a mystifying cloud of words". (See the discussion at pp. 24-25, supra.)

An additional and distinct constitutional vice, moreover, arises out of the clear inconsistency between the Georgia court's earlier decisions, such as Fleming, and its later decision in Spivey. That inconsistency has never been cleared up by the state supreme court.* As a result, some

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* In referring to Fleming in his dissent in Godfrey, 446 U.S. at 453 , Mr. Justice White doubtlessly was unaware that the later decision in Spivey undercut Fleming.

trial judges have taken seriously the more demanding standards of the earlier decisions, such as Fleming, and conscientiously have instructed juries clearly and explicitly on mitigating circumstances, while others have aimed only to meet the unconstitutional Spivey standard. The dramatic variation in the quality of death penalty charges is demonstrated by a comparison of the charge in petitioner's case, not only to the charge in Godfrey (A.68), but also to that in the retrial of Redd v. State, one of the six cases in which the death sentence was reversed because the jury was not told it could return a life sentence even if it found a statutory aggravating circumstance.* In the retrial of Redd on the issue of punishment, Judge Fulcher (the same judge who presided at petitioner's trial): (i) made clear that the jury was to weigh mitigating and aggravating circumstances; (ii) clearly defined the term "mitigating"; and (iii) clearly told the jury that, even if it found a statutory aggravating circumstance, it could nevertheless fix the penalty at life imprisonment (A.70).

That the wide variation in the accuracy and clarity of jury charges from case to case creates a substantial risk that similarly situated defendants will not receive similar penalties is illustrated by a comparison of petitioner's case with Duhart v. State, 237 Ga. 425, 228 S.E.2d 822 (1976), where the jury was given far better guidance on mitigating circumstances, and defendant was sentenced to life imprisonment.**

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* Comparison of the charge in petitioner's case with those in the retrials of the other five cases is equally revealing (see the table at A.139-147).

** In Duhart, a youth accosted a couple, firing a gun, intentionally shot the woman between the legs, and then robbed and killed the taxi driver whom he had called for a ride. The

The pervasive variation in the accuracy and clarity of jury instructions in Georgia is more systematically demonstrated by the chart appearing at A.139-151, which includes all the 71 capital cases in which the Georgia court has considered the adequacy of jury instructions. The charges that have been approved by the Georgia Supreme Court include: 50 in which the jury was instructed to consider mitigating circumstances and 9, including petitioner's, in which it was not; 41 in which the term "mitigation" was defined and 18, including petitioner's, in which it was not; 8 in which particular mitigating circumstances were pointed out, and 51, including petitioner's, in which they were not; 48 in which the jury was instructed that it could return a life sentence even if it found a statutory aggravating circumstance, and 11, including petitioner's, in which it was not.

The variation in jury instructions on critical factors "introduce[s] a level of uncertainty and unreliability into the fact-finding process that cannot be tolerated in a capital case", Beck v. Alabama, 447 U.S. at 643. This is, moreover, not irreducible uncertainty or unreliability. It is wholly

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charge (i) instructed the jury to consider aggravating and mitigating circumstances, (ii) clearly defined the legal term "mitigating", (iii) instructed the jury to consider the mitigating circumstances which the defendant had raised, and (iv) authorized the jury to return a life sentence even if aggravating circumstances were found. 228 S.E.2d at 825-827. A comparison of both the jury charge and the facts of Duhart to those in petitioner's case suggests that the respective jury instructions may have caused dissimilar penalties where both the offense and the offender were substantially similar. We do not know at this time in how many of the 36 capital cases (out of 48) where youth and no prior record was reported, and where a life sentence was imposed, the jury instructions may have been the critical factor.

unnecessary, and could be cured with some simple guidance from the state supreme court. Until that guidance is forthcoming, the death penalty is being imposed in Georgia in violation of the Eighth and Fourteenth Amendments.

V. FAILURE TO TRANSCRIBE ARGUMENTS TO THE JURY AND TO PROVIDE THEM TO THE APPELLATE COURT DEPRIVED PETITIONER OF DUE PROCESS OF LAW.

In Gardner v. Florida, 430 U.S. 349, 361 (1977), this Court ruled that:

> "it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia".

Where, as here, the arguments made to the jury are not transcribed, it is, by definition, impossible for the reviewing court to analyze the considerations which "motivated" the death sentence.

The constitutional error here is, if anything, more serious than that which led to reversal in Gardner. What was missing from the record on appeal there was a "portion" of a confidential presentence investigation report. The trial judge's findings did not indicate that there was anything in it of "special importance". Id. at 353.*

A prosecutor's argument to a jury of laypersons is surely as important. Cf. Griffin v. California, 380 U.S. 609 (1965); Berger v. United States, 295 U.S. 78, 88 (1935).

---

* In Gardner, this Court held that failure of defense counsel to request access to the confidential portion of the

Under Georgia's mandatory appeal scheme in capital cases, reviewed by this Court in Gregg, the trial court must transmit "the entire record and transcript" to the state supreme court. Ga. Code Ann. § 27-2537(a). Independent of any error raised on appeal, the state supreme court must review the record and reverse if it concludes that the sentence was imposed under the influence of "passion, prejudice or any other arbitrary factor". Ga. Code Ann. § 27-2537(c)(1). Here, without the arguments, the entire record was by definition not transmitted. Moreover, it is the prosecutor's summation which is the most likely source of passion, prejudice and other arbitrary factors.

The Georgia Supreme Court itself has recognized this. It has held improper prosecutorial argument in capital case transcripts to be grounds for reversal, even where unobjected to at trial. See Hawes v. State, supra; Prevatte v. State, 233 Ga. 929, 214 S.E.2d 365 (1976). But the Georgia court has held in Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92 (1978), cert. denied, 439 U.S. 991 (1978), that while closing arguments "should" be transcribed in death cases, failure to do so does not warrant reversal unless there is evidence that the prosecutor said something objectionable, 247 S.E.2d at 95-96. But who could remember and could supply such evidence in petitioner's case, particu-

---

report "cannot justify" submission of a record to the reviewing court less complete than that available to the sentencing authority. 430 U.S. at 361.

Similarly, the Georgia Supreme Court has held that improper remarks in a prosecutor's summation in a death case require reversal even though trial counsel made no objection. Hawes v. State, 240 Ga. 327, 240 S.E.2d 833, 839 (1977).

larly in light of his appointed counsel's treatment of his case (see Point I, supra). A transcript is necessary precisely so that questions of what motivated a jury to impose the death penalty will not turn on testimonial disputes. The record in a capital case should exist and should speak for itself. Stephens is inconsistent with this Court's reasoning in Gardner, and with the assumptions in Gregg (where the argument had been transcribed) about the nature of Georgia's mandatory appeal scheme.

Even where the penalty imposed was only $250, this Court has ruled that relevant portions of the record, including the prosecutor's argument, should be provided to indigents, Mayer v. City of Chicago, 404 U.S. 189 (1971). Surely with life in the balance, a state's capital sentencing scheme should ensure that there is "full disclosure of the basis for the death sentence" (Gardner, 430 U.S. at 361).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the order of the Georgia Supreme Court.

Respectfully submitted,

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Of Counsel:

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November 19, 1981.

81-5749

RECEIVED
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SUPREME COURT, U.S.

No.

(A-206)

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ALPHONSO MORGAN,

Petitioner,

-against-

CHARLES MONTGOMERY, WARDEN,
GEORGIA STATE PRISON,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF GEORGIA

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November 19, 1981.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

ALPHONSO MORGAN,

Petitioner,

v.

CHARLES MORTGOMERY, WARDEN,

GEORGIA STATE PRISON,

Respondent.

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

To the Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Petitioner, Alphonso Morgan, by his counsel, prays that an order be entered, pursuant to 28 U.S.C. § 2101(c) and Rule 20.2 of the Rules of the Court, extending by sixty (60) days petitioner's time within which to file a petition for a writ of certiorari to and including November 20, 1981. In compliance with Rule 29.2 of the Rules of the Court, this application is submitted more than 10 days prior to the scheduled filing date for the petition. The pertinent dates are:

June 23, 1981: The Supreme Court of Georgia denied petitioner's application for a certificate of probable cause to appeal the decision of the Superior Court of Tattnall County denying a writ of habeas corpus.

September 21, 1981: Unless extended, petitioner's time for filing a petition for writ of certiorari in this Court will expire.

November 20, 1981: If granted, petitioner's requested sixty (60) day extension of time for filing a petition for writ of certiorari will expire.

In support of this application, petitioner sets forth the following:

1. After a jury trial in the Superior Court of Richmond County, Georgia, petitioner was convicted of murder and sentenced to death.

2. Petitioner appealed to the Supreme Court of Georgia. Petitioner's court-appointed trial counsel had to be ordered, under threat of disciplinary action, to submit a brief, and did not appear for oral argument. At oral argument, the Georgia Court requested, and later received, a brief from the State on the imposition of the death sentence upon petitioner; no brief was requested or received from petitioner. The Supreme Court of Georgia affirmed petitioner's conviction and, by a 4-3 vote, affirmed the death sentence.

3. Petitioner's petition for writ of certiorari in this Court was denied, with two justices dissenting. Morgan v. Georgia, 441 U.S. 967 (1979).

4. Petitioner's petition for rehearing was denied with four justices dissenting. Morgan v. Georgia, 444 U.S. 976 (1979).

5. After a trial in the Superior Court of Tattnall County, Georgia, petitioner's petition for a writ of habeas corpus was denied. On June 23, 1981, the Supreme Court of Georgia denied petitioner's application for a certificate of probable cause to appeal the denial of the petition for a writ of habeas corpus. A copy of the Georgia Supreme Court's order is attached hereto as Appendix A.

6. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

7. Federal questions of substantial importance were raised in the trial court and were decided adversely to the petitioner on the merits. These include the questions (a) whether petitioner's confession should have been excluded as the fruit of an unlawful arrest under the principles articulated in Payton v. New York, 445 U.S. 573 (1980), and in other decisions of this Court; (b) whether Georgia's statutory capital punishment scheme was applied in petitioner's case in violation of the Eighth and Fourteenth Amendment standards established in Gregg v. Georgia, 428 U.S. 153 (1976), Godfrey v. Georgia, 446 U.S. 420 (1980), and other decisions of this Court; (c) whether capital punishment was imposed in violation of the Eighth and Fourteenth Amendments where evidence of mitigating circumstances was excluded as hearsay, as in Green v. Georgia, 442 U.S. 95 (1979); and (d) whether, in a capital case, there has been an unconstitutional denial of counsel where court-appointed counsel had to be coerced by the Georgia Supreme Court to file a brief and failed to appear for oral argument, and where the state court (in the absence of petitioner or his counsel) requested and received a supplementary brief on the imposition of the death penalty from

the state, but neither requested nor received such a brief from petitioner.

8. Petitioner is indigent. His case has been referred to undersigned counsel because, in association with Frederick A. O. Schwarz, Jr. (a member of the Bar of this Court), undersigned counsel represented petitioner pro bono publico in Morgan v. Georgia, supra.

9. An extension of time is needed for the following reasons:

(a) The lengthy state court record was received by counsel only one week ago and, because of the press of other matters, has been reviewed in only a cursory manner thus far.

(b) Mr. Schwarz recently has undertaken to enter public service once again as Corporation Counsel to the City of New York and, thus, will be unable to undertake to represent petitioner in the present case.

(c) While petitioner's counsel is certain that there will be no difficulty in associating another member of the Bar of this Court to represent petitioner, that attorney has not yet been identified and associated. (Undersigned counsel will not be eligible for membership in the Bar of this Court before October 1982. This application is made pursuant to Rule 47(2) of the Rules of the Court.) Naturally, any counsel who is associated will need to review the record below.

(d) Petitioner's counsel will be married on September 13, 1981, and has longstanding plans to be out of the country for three weeks thereafter. In the absence of the requested extension, the planned trip will have to be canceled,

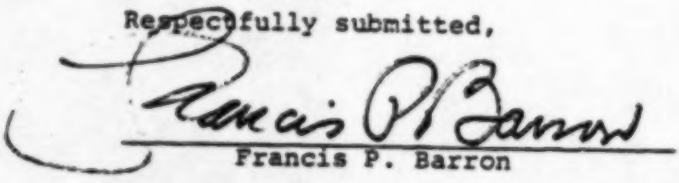
since the attention of undersigned counsel is important to the proper presentation of petitioner's case (particularly in the absence of Mr. Schwarz).

(e) The record below is lengthy, the issues presented are complex, and counsel has not yet had the opportunity to review the facts and the law. An extension of time is necessary to properly present the issues to the Court and to prevent injustice to petitioner, particularly since this is a capital case.

10. Counsel for petitioner has been informed by Nicholas G. Dumich, Assistant Attorney General for the State of Georgia representing respondent Montgomery, that respondent has no objection to an extension of 45 days and will not oppose this application.

WHEREFORE, petitioner respectfully requests that this application be granted and that the time for petitioner to file his petition for a writ of certiorari be extended to and including November 20, 1981.

Respectfully submitted,



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Counsel for Petitioner
Alphonso Morgan

September 1, 1981

Supreme Court of the United States

No. A-206

ALFONSO MORGAN,

Petitioner

v.

CHARLES MONTGOMERY, WARDEN, GEORGIA STATE PRISON

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 20, 1981

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 8th day of September, 1981

Application No. 1640

SUPREME COURT OF GEORGIA

ATLANTA, June 23, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

ALPHONSO MORGAN V. CHARLES MONTGOMERY, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Hill, P.J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

A.07

IN THE SUPREME COURT

STATE OF GEORGIA

ALPHONSO MORGAN,	:	
	:	
Petitioner,	:	APPLICATION
	:	
v.	:	NO. _____
	:	
CHARLES MONTGOMERY, Warden Georgia State Prison	:	
	:	
Respondent.	:	

APPLICATION FOR CERTIFICATE
OF PROBABLE CAUSE

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IN THE SUPREME COURT

STATE OF GEORGIA

ALPHONSO MORGAN,	:	
	:	
Petitioner,	:	APPLICATION
	:	
v.	:	NO. _____
	:	
CHARLES MONTGOMERY, Warden Georgia State Prison	:	
	:	
Respondent.	:	

APPLICATION FOR CERTIFICATE
OF PROBABLE CAUSE

On the following basis, Alphonso Morgan, by counsel, respectfully petitions this Court for a Certificate of Probable Cause to appeal an order and judgment by the Tattnall County Superior Court denying his Petition for Writ of Habeas Corpus.

STATEMENT OF THE CASE

1. On July 14, 1977, Morgan was convicted in the Superior Court of Richmond County of the following three offenses: (A) murder; (B) armed robbery; and (C) kidnapping. By a final judgment entered on the same date, he was sentenced to (A) death; (B) life imprisonment; and (C) twenty years imprisonment, respectively, upon these three convictions.

2. On June 28, 1978, the Supreme Court of Georgia affirmed Morgan's convictions and sentences, with three judges dissenting, Morgan v. State, 241 Ga. 485 (1978).

3. On March 24, 1979, Morgan filed a certiorari petition in the Supreme Court of the United States (No. 78-6140(A-697)). On May 21, 1979, that Court denied certiorari, with two justices dissenting, Morgan v. Georgia, _____U.S._____, 60 L.Ed.2d 1073 (1979). On June 14, 1979, Morgan timely filed a Petition for Rehearing in the Supreme Court of the United States, and November 26, 1979, that Court denied that Petition for Rehearing with four justices dissenting, ____ U.S. ____, 62 L.Ed.2d 393 (1979).

4. On July 23, 1980, a Petition for Writ of Habeas Corpus was filed in the Superior Court of Tattnall County. The Writ was denied on March 27, 1981. Notice of Appeal was timely filed in the Superior Court of Tattnall County (a copy of the Notice of Appeal is attached as Appendix A).

GROUNDS FOR GRANTING THIS APPLICATION

1. Morgan was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Section I, Paragraph IX of the Georgia Constitution. The way in which these rights were violated include, but are not limited to, the following:

(a) Counsel for Morgan failed to appear for oral argument of Morgan's appeal in the Georgia Supreme Court.

(b) Counsel for Morgan failed to file a brief on a question on which the Supreme Court requested briefing during oral argument, and a question on which the Court ultimately split 4-3.

(c) Both the trial and appellate courts were aware that Morgan sought new assigned counsel, and assigned trial counsel had told the trial court that because of the lack of cooperation by his client he was unable to put on a defense through the client.

(d) Counsel for Morgan failed to interview witnesses and properly investigate the case as related to issues of guilt or innocence and as related to mitigating circumstances for the penalty phase of the trial. Counsel is ineffective, "if he fails to investigate sources

of evidence which may be helpful to the defense." Davis v. Alabama, 396 F.2d 1214, 1217 (5th Cir., 1979. It is the duty of counsel to interview potential witnesses and to make a independent examination of the factual circumstances and law involved. United States v. Johnson, 615 F.2d 1125 (5th Cir., 1980); Rummel v. Estelle, 590 F.2d 103 (5th Cir., cert. granted, 441 U.S. 960 (1979). Through a minimal effort, Morgan's trial counsel could have obtained the testimony of a number of people concerning Morgan's good character and other mitigating circumstances. H. C. Tr., Ex. 2.[1]

(e) Counsel for Morgan failed to file necessary motions.

(f) Counsel for Morgan failed to file challenge to unconstitutional composition of both grand and traverse juries.

(g) Morgan's conviction was unconstitutional because he was convicted by a jury under the influence of passion, prejudice and other arbitrary factors, in violation of the Constitutions and the laws of the United States and Georgia. Morgan was prevented from having a fair trial by extensive and prejudicial pre-trial publicity surrounding the case. Morgan's counsel should have, and failed to, request a change of venue.

---

[1] H. C. Tr. refers to the transcript of the Habeas Corpus hearing. T. Tr. refers to the trial transcript.

(h) Counsel for Morgan did not discuss relevant trial-related decisions with Morgan and failed to provide Morgan with the minimal attorney services necessary in any criminal case.

(i) Counsel for Morgan failed to offer any evidence in the penalty phase of the trial, while there was evidence of mitigating circumstances. Morgan's counsel stood still and did nothing during the sentencing phase dispite the fact that an array of witnesses to testify in mitigation would have been readily available upon proper, or even minimal, investigation. This amounts to a clear violation of Morgan's constitutional rights to effective assistance of counsel and due process. The United States District Court for the Northern District of Mississippi recently found ineffective assistance of counsel where counsel failed to present any evidence at the penalty stage in a capital case. Voyles v. Watkins, 489 F.Supp. 901 (N.D. Miss. 280). Accord, State v. Myles, 309 So.2d 12 (La. 1980). See also, Hamilton v. Alabama, 368 U.S. 52, 55 (1961); Passmore v. Estelle, 607 F.2d 622, 664 (5th Cir.), modifying 594 F.2d 115 (5th Cir., 1979). Morgan's trial counsel not only failed to present any evidence during the penalty stage of trial, he failed to do any preparation for the penalty stage, he did not investigate potential evidence, and he neither interviewed nor contacted witnesses to testify in mitigation.

2. Morgan was denied effective assistance of counsel by the system and practice of appointment of counsel for indigent persons in capital cases in Georgia.

By historical practice and by statute in Georgia, appointed counsel in capital cases are underpaid and are given no assistance such as investigative and expert witnesses.

As a result, virtually no court appointed counsel renders anything approaching effective assistance of counsel in capital cases.

3. Morgan's conviction and death sentence were imposed in violation of the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States and Article I, Section I, Paragraph I of the Georgia Constitution, because on the mandatory appeal of Morgan's death sentence counsel for the state but not counsel for Morgan, who was not present, was requested to brief an issue on which the Court split 4-3, and did brief that issue without Morgan or his counsel having notice that that issue was being briefed or an opportunity to brief the issue resulting in the receipt of an ex parte communication by the Court.

4. Morgan's conviction and death sentence were imposed in violation of the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States and Article I, Section I, Paragraph I of the Georgia Constitution, because the arguments of counsel to the jury concerning the penalty to be imposed was not transcribed without notice to or consent of Morgan or his counsel, thus denying Morgan meaningful appellate review of his death sentence. In Gardner v. Florida, 430 U.S. 349, 361 (1977) the Supreme Court held that it is important that a record on appeal disclosed to the reviewing court the considerations which motivated the death sentence in every case. Under Georgia law, the trial court must transmit "the entire record and transcript" to the Georgia Supreme Court.

Ga. Code Ann. § 27-2537(a). This Court has recognized that improper prosecutorial argument in death case transcripts can be ground for reversal, even where unobjected to at trial. Prevatte v. State, 233 Ga. 929, 214 S.E.2d 365 (1975). In this case, unlike in Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92 (1978) trial counsel did not waive transcription of closing argument.

5. Morgan's death sentence was imposed in violation of the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section I, Paragraph I and Article I, Section I, Paragraph XIV of the Georgia Constitution, because the statutory "aggravating circumstance" found by the jury recommending the death penalty is unconstitutionally overbroad and vague. The statute is being applied in an unconstitutional manner in the State of Georgia.

6. Morgan's conviction and death sentence were imposed in violation of the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section I, Paragraph I and Article I, Section I, Paragraph XIV of the Georgia Constitution, because the jury was not instructed that its recommendation of the death sentence was binding upon the trial judge. The trial judge's last statement to the jury as to its role was that it must decide whether to "recommend" the death penalty. Previously the judge had instructed the jury that if it decided on death the form of the verdict should be: "we recommend his punishment as death" (T. Tr., 230) (emphasis added). To "recommend" is not to render a binding decision, and when the jury returned it said, "we ask the death penalty" (T. Tr., 232) (emphasis added).

7. Morgan's death sentence violates the Due Process clause of the Fourteenth Amendment to the Constitution of the United States and the laws of the State of Georgia because the

trial judge failed to charge the jury properly on the meaning and consideration of mitigating circumstances. The trial judge charged the jury as follows:

> "You should consider all of the facts and circumstances including any mitigating or aggravating circumstances."
>
> T. Tr., 229.

"Mitigating circumstances" was not defined, and the word "mitigating" was simply buried in the last sentence of the first paragraph of the death penalty charge. This is inconsistent with Lockett v. Ohio, 438 U.S. 586 (1978) and Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir., 1978) which, taken together, require the court to instruct the jury on the need to weigh the defendant's particular characteristics as well as the specific circumstances of the crime.

8. Morgan's death sentence violated the Due Process Clause of the Fourteenth Amendment to the Constition of the United States and the laws of the State of Georgia because the trial judge failed to charge the jury on the balancing of any mitigating and aggravating circumstances in their determination of sentence.

9. Morgan's conviction and death sentence were imposed in violation of the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section I, Paragraph I and Article I, Section I, Paragraph XIV of the Georgia Constitution, because the trial court refused to admit relevant, hearsay evidence which evidence is admissable concerning mitigating circumstances. Defense counsel sought to show through a police witness that the confession of Petitioners co-indictee would support Petitioner's contention that he had shot at the victim under duress, and that thereafter, the co-indictee fired the fatal shot. The Court excluded such proof as hearsay. T. Tr., 139-140. This evidence would have been highly relevant to the

critical issue of mitigating circumstances. Under similar circumstances, in Green v. Georgia, 442 U.S. 95 (1979) the Supreme Court vacated a capital sentence because the trial court refused to admit hearsay testimony concerning mitigating circumstances.

10. Morgan's death sentence violated the due process clause of the Fourteenth Amendment to the Constitution of the United States and the laws of the State of Georgia because the trial judge failed to charge the jury properly on the meaning of "aggravating circumstances," and particularly failed to charge the jury properly on the meaning of the aggravating circumstances set forth in Ga. Code Ann. § 27-2534.1(b)(7).

The trial judge instructed the jury on aggravating circumstances as follows:

> "I charge you that a finding of statutory aggravating circumstances or circumstances shall only be based upon evidence convincing your minds beyound a reasonable doubt--and reasonable doubt has previously been defined in the first phase of the trial--as to the existence of one or more of the following factual conditions, in connection with the defendant's perpetration of the offense for which ;you found him guilty. With respect to the offense of murder, they are: The offense of murder was committed while the offender was engaged in the commission of another capital felony, armed robbery; or the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, or depravity of mind, or an aggravated battery to the victim. Now, an aggravated battery is when on maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring him, his body, or a member thereof; or that the offender committed the offense of murder for the purpose of receiving money.
>
> T. Tr., 1, p. 230-21.

No further explanation was given of the § (b)(7) aggravating circumstance. Repeating the language of § (b)(7) is clearly inadequate to protect against capricious and arbitrary decisions. The statute offers a jury no guidance concerning its intended meaning, Godfrey v. Georgia, 100 S. Ct.

1759, 1765 (1980) and when no further guidance is given to the jury, its interpretation of § (b)(7) ". . . can only be subject to sheer speculation", Id. at 1965.

The second criteria addressed in Godfrey involves the role of the Georgia Supreme Court in its sentencing review. Like the trial court, the State Supreme Court is also required to delimit § (b)(7) by applying the three definitional standards, Godfrey v. Georgia, supra at 1767. Under the Godfrey rationale, the death sentence in this case should be vacated. The Georgia Supreme Court failed to delimit § (b)(7) in the required manner.

On direct review of Petitioner's death sentence, the sole review by the Georgia Supreme Court of the application of the § (b)(7) was as follows:

> "The jury found the following statutory aggravating circumstance: The offense of murder was outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind, or an aggravated battery to the victim. Code Ann. § 27-2534.1(b)(7). This aggravating circumstance is supported by the evidence. The evidence supports the jury's findings."

The trial jury was given no guidance on the standards by which the § (b)(7) circumstance is applied and this Court gave no hint of the standards used in its review.

Petitioner's death sentence for murder was based on the § (b)(7) circumstance and the aggravating circumstance defined in Ga. Code Ann. § 27-2534.1(b)(4). This additional aggravating circumstance does not affect the invalidity of the death sentence.

Even though a jury finds that more than one aggravating circumstance exists, it is nevertheless free to impose a life sentence. While the finding of one or more aggravating circumstances permits a sentence of death, the finding of such circumstances never requires that it be imposed. See, e.g., Bowen v. State, 241 Ga. 492, 246 S.E.2d 322 (1978).

In Stephens v. Zant, No. 79-2407 (5th Cir., 1980), the court held that a death sentence based in part on the jury's finding of an invalid aggravating circumstance cannot stand even if the jury also found other, valid aggravating circumstances.

> "It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional aggravating circumstance. The jury had the authority to return a life sentence even if it found statutory aggravating circumstances. It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty but for the . . . [invalid ground]."
> Stephens v. Zant, supra, at 1520.

Because it cannot be said with assurance that the improper finding of a § (b)(7) circumstance played no part in the jury's decision to impose the death sentence, Petitioner's death sentence should be vacated.

11. Morgan's conviction and death sentence were imposed in violation of the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States and Article I, Section I, Paragraph I of the Georgia Constitution, because the Morgan's statements were involuntary and should have been excluded as the fruit of an unlawful arrest where: (a) there was only conclusory testimony that information supporting probable cause was reliable, (b) no warrant was obtained for the daybreak arrest in Morgan's home (although the police concede the facts which demonstrated time to secure a warrant) and (c) the trial court declined to rule on the legality of the arrest.

Morgan was arreseted in his home at day break. T. Tr., 108, 100. The arrest was warrantless. T. Tr., 119. Because the house was completely surrounded by police, entry was not consentual. T. Tr., 119. Bumper v. North Carolina, 391 U.S. 543 (1968). There were no exigent circumstances.

Since the house was completely surrounded by police, the police had sufficient time to test their right to arrest before a neutral magistrate. See, Coolidge v. New Hampshire, 403 U.S. 443 (1971).

A warrantless, nonconsensual entry into a suspect's home to make a felony arrest under non-exigent circumstances is violative of the Fourth Amendment, and the fruit of that arrest must be suppressed. Payton v. New York, ___ U.S. ____, 63 L.Ed.2d 639, 100 S. Ct. ___ (1980).

12. Morgan's death sentence is a cruel and unusual punishment and deprives him of life without due process of law in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States, and in violation of Article I, Section I, Paragraph I; Article I, Section II, Paragraph III, Article I, Section I, Paragraph XIV of the Georgia Constitution, because it was imposed pursuant to the verdict of a jury selected through procedures that systematically excluded from jury service all persons having conscientious or religious scruples against capital punishment.

13. Morgan's death sentence was imposed in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States; and in violation of Article I, Section I, Paragraph I; Article I, Section II, Paragraph III, Article I, Section I, Paragraph XI of the Georgia Constitution, because it was imposed pursuant to the verdict of a jury from which all persons having conscientious or religious scruples against capital punishment were systematically excluded, with the result that the jury did not constitute a representative cross-section of the community.

14. Morgan's conviction and death sentence were rendered in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, and of Article I, Section I, paragraph I;

Article I, Section II, Paragraph III; Article I, Section I, Paragraph XI of the Georgia Constitution, because all persons having conscientious or religious scruples against capital punishment were systematically exclused from the jury which determined Morgan's guilt or innocence, thereby depriving Morgan of a vital constitutional right, his right to a jury selected from a representative cross-section of the community, without furthering any permissible state interest.

15. Morgan's conviction and death sentence were rendered in violation of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and of Article I, Section I, Paragraph I; Article I, Section II, Paragraph III; Article I, Section I, Paragraph XI of the Georgia Constitution, because he was convicted and sentenced to die by a jury that did not reflect a representative cross-section of the community and was not impartial in fact, but was unrepresentative and biased in favor of the prosecution on the issue of Morgan's guilt of the crimes with which he was charged.

16. Morgan's conviction and death sentence is unconstitutional because the prosecutor exercised his peremptory challenges in a racially biased manner which resulted in the exclusion of members of the black race from serving on the jury in violation of the Sixth and Fourteenth Amendments of the United States Constitution. The Constitution guarantees Morgan the right to a fair and impartial hearing before a jury which is representative of the racial composition of the community of the forum. The discriminatory use of peremptory challenges by the prosecutor denied Morgan his constitutional rights for the following reasons:

(a) On information and belief Morgan states that the District Attorney has over a long period of time developed a pattern and practice of excluding members of the black race from being allowed to serve on the jury.

(b) The exclusion of members of the black race from the jury deprives Morgan of a representative jury composed of members of the community whose perceptions of the circumstances are cognizably different from members of the white race.

There was an intentional, discriminatory and systematic exclusion of blacks from the jury through the use of peremptory challenges by the prosecutor. The jurors who heard the evidence against the Morgan were not representative of the community. Therefore, Morgan was denied his constitutional rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

17. Morgan's conviction and death sentence were imposed in violation of the rights guaranteeed Morgan by the Constitution of the State of Georgia, Art. I, Sec. I, Paras. I and XI; and Art. I, Sect. II, Paras. III and XI (Ga. Code § 2-203, 2-101, 2-111, 2-109) and by the Sixth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States and 18 U.S.C. § 243 because Morgan was indicted by a grand jury from a grand jury pool from which the following classes in Richmond County were systematically excluded: (a) young adults aged 18 to 30; (b) Blacks; (c) Blacks aged 18 to 30; (d) students; (e) military personnel; (f) poor people; and (g) operators of one person businesses. The exclusion of these classes was caused by (a) discriminatory intented evidenced by Richmond County jury lists which Petitioner states on information and belief reveal a history and pattern of intentional, discriminatory, and systematic exclusion of members of these classes; and (b) Georgia Laws 1973, pp. 484-85 (Ga. Code § 59-106) which requires a jury commission to select for jury service, persons "from the official registered voter's list of the county" and which, by its nature, disproportionately eliminates from consideration members of these classes in that

such persons traditionally do not register to vote or do not meet the residency requirements for inclusion on the voter's list. Members of the above mentioned classes are similarly excluded from the jury commission which selects jurors and are afforded no procedure by which to obtain representation on the jury commission. The exclusion of members of these classes from the grand jury pool and jury commission is violative of the aforementioned constitutional provisions and statutes.

18. Morgan's conviction and death sentence were imposed in violation of the rights guaranteeed Morgan by the Constitution of the State of Georgia, Art. I, Sec. I, Paras. I and XI; and Art. I, Sect. II, Paras. III and XI (Ga. Code § 2-203, 2-101, 2-111, 2-109) and by the Sixth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States and 18 U.S.C. § 243 because Morgan was convicted and sentenced by a traverse jury from a traverse jury pool from which the following classes in Richmond County were systematically excluded: (a) young adults aged 18 to 30; (b) Blacks; (c) Blacks aged 18 to 30; (d) students; (e) military personnel; (f) poor people; and (g) operators of one person businesses. The exclusion of these classes was caused by (a) discriminatory intent evidenced by Richmond County jury lists which Petitioner states on information and belief reveal a history and pattern of intentional, discriminatory, and systematic exclusion of members of these classes; and (b) Georgia Laws 1973, pp. 484-85 (Ga. Code § 59-106) which requires a jury commission to select for jury service, persons "from the official registered voter's list of the county" and which, by its nature, disproportionately eliminates from consideration members of these classes in that such persons traditionally do not register to vote or do not meet the residency requirements for inclusion on the voter's list. Members of the above mentioned

classes are similarly excluded from the jury commission which selects jurors and are afforded no procedure by which to obtain representation on the jury commission. The exclusion of members of these classes from the traverse jury pool and jury commission is violative of the aforementioned constitutional provisions and statutes.

19. The Georgia law requiring jury commissioners to select jurors only from voter registration rolls denied Morgan his rights guaranteed by the Sixth Amendment and Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States because that selection process per se prohibits a representative cross section of the community.

20. Morgan's conviction and death sentence were imposed in violation of the rights guaranteed Morgan by the Constitution of the State of Georgia, Art. I, Sec. i, Paras. I and XI; and Art. I, Sec. II, Paras. III and XI (Ga. Code § 2-203, 2-101,2-111, 2-209) and by the Sixth Amendment and the Due and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States and 18 U.S.C. § 243 because he was convicted and sentenced by a jury composed pursuant to Georgia Laws 1967, p. 725, Ga. Code § 59-112(b) and Georgia Laws 1921, p. 106, Ga. Code § 72-20, which arbitrarily single out women, including those without young children, as being specially exempt from jury service in violation of the aforementioned constitutional provisions and statutes.

21. Morgan's conviction and death sentence were imposed in violation of the rights guaranteed Morgan by the Constitution of the State of Georgia, Art. I, Sec. i, Paras. I and XI; and Art. I, Sec. II, Paras. III and XI (Ga. Code § 2-203, 2-101,2-111, 2-209) and by the Sixth Amendment and the Due and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States and 18 U.S.C. § 243

because he was convicted and sentenced by a jury composed pursuant to Georgia Laws 1967, p. 725, Ga. Code § 59-112(b) which arbitrarily singles out women who are housewives with children 14 years of age or younger for a special exemption from jury service, whether or not, in a particular case, such a woman is custodially responsible for her children or whether or not her children would interfere with her responsibility to serve on juries, and without regard to men who are similary situated, in violation of the aforementioned constitutional provisions and statutes.

22. Morgan's conviction and death sentence were imposed in violation of the rights guaranteed Morgan by the Constitution of the State of Georgia, Art. I, Sec. i, Paras. I and XI; and Art. I, Sec. II, Paras. III and XI (Ga. Code § 2-203, 2-101,2-111, 2-209) and by the Sixth Amendment and the Due and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States and 18 U.S.C. § 243 because he was convicted and sentenced by a jury composed by persons charged with processing applications from prospective jurors in Richmond County seeking to be excused from jury duty who conduct no investigation of alleged excuses proffered by prospective jurors, thus exacerbating the exclusionary policies outlined in sections 27 and 28 above in violation of the aforementioned constitutional provisions and statutes.

23. The imposition and execution of Morgan's death sentence under Georgia law and practice violate the Eighth and Fourteenth Amendments to the Constitution of the United States, and Article I, Section I, Paragraph XIV of the Georgia Constitution, because:

(A) the death penalty is in fact administered and applied arbitrarily and capriciously in the State of Georgia; and Morgan was sentenced to die, and will be executed, pursuant to a pattern and

practice of wholly arbitrary and capricious infliction of that penalty;

(B) the theoretical justifications for capital punishment are groundless and irrational in fact; and death is thus an excessive penalty which fails factually to serve any rational and legitimate social interests that can justify its unique harshness;

(C) actual infliction of the death penalty in general and in cases like Morgan's has in fact been repudiated by contemporary standards of decency and dignity;

(D) the means by which the death sentence is administered to Morgan inflict wanton and unnecessary torture and torment upon him.

24. The imposition and execution of Morgan's death sentence violate the Eighth and Fourteenth Amendments to the Constitution of the United States, and Article I, Section I, Paragraph XIV of the Georgia Constitution, because they inflict a punishment that is cruel and unusual in consideration of all of the relevant facts relating to the offense and the offender, including mitigating circumstances.

25. The imposition and execution of Morgan's death sentence under Georgia law and practice violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and Article I, Section I, Paragraph I; Article I, Section II, Paragraph III; Article I, Section II, Paragraph IX of the Georgia Constitution, because Morgan's death is being exacted pursuant to a pattern and practice of Georgia prosecuting authorities, courts, juries and Governors to discriminate on grounds of race, sex and poverty in the administration of capital punishment.

CONCLUSION

For these substantial reasons, and for others not here specifically addressed, this Court should grant this Application for Certificate of Probable Cause to Appeal.

Respectfully Submitted,

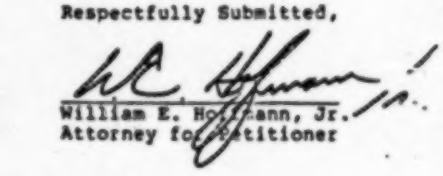

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EXHIBIT 'A'

IN THE SUPERIOR COURT OF TATTNALL COUNTY
STATE OF GEORGIA

ALPHONSO MORGAN,	:	
	:	
Petitioner,	:	HABEAS CORPUS
	:	
v.	:	NO. 80-118
	:	
CHARLES MONTGOMERY,	:	
	:	
Respondent.	:	

NOTICE OF APPEAL

Notice is hereby given that Alphonso Morgan, the above-named Petitioner, hereby appeals to the Supreme Court of Georgia from the order denying his Petition for Writ of Habeas Corpus, dated March 25, 1981.

Petitioner is proceeding in forma pauperis.

The Supreme Court rather than the court of Appeals, has jurisdiction of this appeal for the reason that the appeal involves Petitioner's conviction for a capital offense in which the death penalty was imposed.

Dated: April 21, 1981.

Respectfully submitted,

William E. Hoffmann, Jr.
Attorney for Petitioner

OF COUNSEL:

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Atlanta, Georgia 30383
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IN THE SUPERIOR COURT OF TATTNALL COUNTY

STATE OF GEORGIA

ALPHONSO MORGAN,	*	
Petitioner	*	
vs.	*	HABEAS CORPUS
CHARLES MONTGOMERY, Warden	*	CASE NO. 80-118
Georgia State Prison,	*	
Respondent	*	

ORDER

The above captioned case having come before the Court on the Petitioner's petition for habeas corpus relief, with the petitioner, Alphonso Morgan, being represented by attorney William E. Hoffmann, Jr., and the Respondent being represented by Assistant Attorney General John Dunsmore. The Court, after considering the testimony and documentary evidence admitted in this case, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Petitioner, at the time of filing of this action, was incarcerated at the Georgia State Prison at Reidsville, Tattnall County, Georgia. The Respondent, as the Warden at Georgia State Prison, was holding the Petitioner under the color of authority of the Petitioner's sentences from the Superior Court of Richmond County in which the Petitioner was convicted of the offenses of Murder, Armed Robbery, and Kidnapping on the 14th

Filed in Office
This 27 Day of Nov. 1981
Time: 10:20 A.M.
[illegible]
Deputy Clerk

day of July, 1977. The Petitioner, at that time, received the death sentence for the charge of Murder, a sentence of life imprisonment on the Armed Robbery charge, and a sentence of twenty (20) years to serve on the charge of Kidnapping. The death sentence was recommended by the jury after finding the statutory grounds of aggravating circumstances as required by law. The Superior Court Judge of Richmond County imposed the life sentence and the sentence of twenty (20) years to serve for the charges of Armed Robbery and Kidnapping.

The Georgia Supreme Court affirmed the Petitioner's conviction on June 28, 1978. Morgan v. State, 221 Ga. 485 (1978). The Petitioner then filed a petition for certiorari with the United States Supreme Court, but that petition was denied with two justices dissenting. Morgan v. Georgia, 60 L.E.2d 1073 (1979). On June 14, 1979, the Petitioner, Alphonso Morgan, timely filed a petition for a rehearing in the Supreme Court of the United States, and that Court denied the Petitioner's petition for a rehearing with four (4) justices dissenting. Morgan v. Georgia, 62 L.E.2d 303 (1979).

The Petitioner, in his petition as amended, has alleged in Count 10 of his petition, which is the first allegation of error, that his constitutional rights have been violated in that he was afforded ineffective assistance of counsel at his trial. The Petitioner bases his contentions on various actions of the Petitioner's counsel during the trial and appellate process. This Court will consider each allegation of ineffective assistance of counsel as they arise.

The Georgia Supreme Court has repeatedly denied granting of a habeas corpus petition on the grounds of ineffective assistance of counsel when the complaint deals with trial strategy. Pullin v. State, 237 Ga. 759 (1976); Banks v. Glass,

242 Ga. 518 (1978). Effectiveness of counsel is not determined by whether or not the Petitioner was convicted, or in this case sentenced to death, but rather the determination is made on whether or not the assistance of counsel was reasonably likely to render aid to defendant at the time of the trial. The mere fact that the Petitioner's present counsel or expert witness would, in hindsight, have made a different decision does not render the trial counsel's assistance ineffective. Pitts v. Glass, 231 Ga. 638 (1974); Estes v. Perkins, 225 Ga. 268 (1969).

The Petitioner's first allegation of ineffective assistance of counsel in his complaint as amended contends that the trial counsel, Chris G. Nicholson, was ineffective in that he failed to appear for oral argument in the Georgia Supreme Court. This Court, after reviewing the testimony of the trial counsel, finds that attorney Chris G. Nicholson did fail to appear for argument on the Petitioner's appeal in the Georgia Supreme Court. This Court, however, does not consider this failure to appear as a sufficient ground to constitute the finding of ineffective assistance of counsel, as the Rules of the Georgia Supreme Court permited, but did not require at that time, the defendant's counsel to orally argue his contentions before that Court. Supreme Court Rule 23(A) (1975). The Court therefore finds that the contention of the Petitioner is without merit and denies the petition on this ground.

The second allegation of ineffective assistance of counsel by the Petitioner concerns the trial counsel's failure to file a supplemental brief on a question raised by the Georgia Supreme Court during oral argument. The question raised by that Court ultimately resulted in the Supreme Court rendering

a decision with the Justices voting to affirm the conviction by a vote of four to three. This Court, after reviewing the records of the Georgia Supreme Court, finds that the attorney, Chris G. Nicholson, did fail to file a supplemental brief in response to a supplemental brief submitted by the State to the Georgia Supreme Court. This Court, after reviewing the record, finds that the failure of the trial counsel to file the brief is not a sufficient ground for a determination that the assistance of counsel was ineffective, as the Georgia Supreme Court ultimately determined the issue on its own. This Court therefore denies the relief prayed for by the Petitioner on this ground.

The Petitioner next alleges that attorney Chris G. Nicholson was ineffective in his assistance to the Petitioner at his trial in that he failed to interview witnesses and properly investigate the case as related to the issue of guilt or innocence. The Petitioner bases his contention on the trial counsel's alleged failure to discover prior to trial that a witness from the Georgia State Crime Laboratory was going to testify that the safety on the shotgun did not work properly. The expert witness for the Petitioner contended that this action was ineffective as the witness's testimony could have been developed to show an accidental discharge of the shotgun.

The trial counsel, on the other hand, testified that he interviewed various police officers involved in the case and various other people who knew anything about the case, but could not find any evidence that would exculpate the Petitioner in this case. He further testified that his investigation of the case involved his going to the preliminary hearing of the Petitioner's co-defendants, Jose High and Judson Ruffin. Attorney Nicholson also investigated the case by talking at great length

to the co-defendants' attorneys concerning the information they had turned up in their investigation.

The action of the trial attorney, in failing to explore the area suggested by the expert witness for the Petitioner in cross examination does not show that the attorney failed to interview witnesses or investigate the case. The testimony of the trial counsel indicated that his trial strategy was to show that the Petitioner was coerced by the co-defendant, Jose High. The trial counsel further stated that he knew that such a defense was not beneficial in the guilty-innocence phase of the trial; however, he was trying to introduce evidence of mitigating circumstances during the entire trial. This action of the trial counsel is logical and is to be considered as a trial strategy as the Petitioner had made two separate statements to law enforcement officers and each statement indicated that he did perpetrate the crime as charged.

The theory suggested by the expert witness of the Petitioner would, in essence, be a theory produced in hindsight. Any error of the trial counsel in his trial strategy, or any theory possibly suggested by another attorney in hindsight, is not a ground for the Court to find ineffective assistance of counsel. The assistance of the trial counsel in the Petitioner's case was reasonably likely to render aid to the Petitioner during the time of his trial. Pullin v. State, supra; Pitts v. Glass, supra. The Court therefore finds that the Petitioner's contention is without merit and denies the petition on this ground.

In his complaint, the Petitioner alleges that the trial counsel, Chris G. Nicholson, was ineffective in that he failed to interview witnesses and properly represent the case as

related to mitigating circumstances in the penalty phase of the trial. This contention is based upon the fact that the Petitioner introduced several affidavits of friends and relatives of the Petitioner that would have testified as to the Petitioner's good character if the trial counsel had contacted them to do so. The trial counsel testified that he did not consider this type of evidence as he would have to put the Petitioner's character in issue. The trial counsel testified that, in his opinion, it would not have been the wisest decision to do so as he was aware of several pending charges against the Petitioner at that time involving other crimes of violence, which included approximately three other murder charges.

When a defendant elects to put his character into issue, the State on cross-examination may inquire with particularity to test the good character witness's basis for his opinion, and may inquire if he has not heard that the defendant is accused of other crimes. Upton v. State, 128 Ga. App. 547 (1973). The action of the trial counsel in the penalty phase was an appropriate trial strategy, and this Court should not require trial counsel to needlessly interview witnesses when he knows that such testimony would serve no useful function. Pullin v. State, supra; Banks v. Glass, supra. The Court therefore finds that the allegation of ineffective assistance of counsel is without merit and denies the petition on this ground.

The Petitioner, in his complaint, also alleges that the trial counsel, Chris Nicholson, was ineffective in that he failed to file the necessary motions on the behalf of the Petitioner prior to his trial. The motions that the Petitioner

claims that should have been filed are Brady v. Maryland type motions, motions concerning the composition of the grand and traverse jury, and a motion for change of venue due to pre-trial publicity.

The trial counsel testified at the habeas corpus hearing that he did not file a Brady motion because he did not find any evidence of any information that would have been exculpatory to the defendant at that time. He further testified that he did not file a motion on the composition of the grand jury, as the Petitioner's co-defendants did so which was granted by the trial court. The Petitioner, in this case, was automatically re-indicted without any motions being made by the trial counsel. The reasoning of the trial counsel for not filing any motions on the composition of the traverse jury was that in his opinion the traverse jury in Richmond County in previous years had opened up a great deal in permitting minorities and women into the jury box and that such action would have been fruitless.

The trial attorney also testified that he restrained from filing many motions because he wished to keep the pre-trial publicity concerning his client to a very minimum so as to afford him a fair trial in that community. He testified that he was willing for the Petitioner's co-defendants' counsel to create publicity for themselves, as he considered Jose High and Judson Ruffin to be more cuplable than his client. The trial attorney further testified that he did not file a motion for change of venue for pre-trial publicity, as he had conducted in the last year extensive research into that type of motion. He had determined that it was very difficult to prove the grounds for such a motion, as the final determination to be made by the court dealt with whether or not the defendant

could receive a jury that was not biased or prejudiced against him due to the pre-trial publicity. The amount of pre-trial publicity does not necessarily necessitate the filing of a change of venue. This would be especially true in this case as the trial did not take place until one year after the offense had occurred. Many jurors on voir dire indicated that they either did not remember the case, or remembered very little about the case, and therefore, the Court would not have sustained such a motion. These decisions of the trial counsel would be in the nature of trial strategy, and therefore, would not be grounds for a determination of ineffective assistance of counsel. Pullin v. State, supra; Banks v. Glass, supra. The Court therefore finds that the Petitioner's contentions are without merit and denies the petition on this ground.

The remaining contention of the Petitioner on the issue of ineffective assistance of counsel of the trial counsel deals with the contention that attorney Chris G. Nicholson did not discuss relevant trial related decisions with the Petitioner, Alphonso Morgan, and failed to provide the Petitioner with the minimum attorney's services necessary in any criminal case. The basic contention of the Petitioner on this issue that the trial counsel did not discuss in length with the Petitioner the pros and cons of the Petitioner testifying on his own behalf.

The Petitioner, in this case, is a young black male and is of medium intelligence. He testified that he looked toward his attorney to advise him and to handle the defense of his case. The Petitioner's trial counsel testified that he discussed with the Petitioner about testifying in his behalf, and also tested the Petitioner by asking several difficult questions himself. In his opinion, he felt that Petitioner would not make a good witness on his own behalf and declined to call him as a witness.

The decision of the trial counsel is to be considered as trial strategy as the trial counsel did not wish the Petitioner to go to the witness stand and testify that he did not know the co-defendants in that case even though the Petitioner had made two prior confessions to law enforcement officers admitting his involvement in the crimes with the co-defendants. The Court therefore finds that the Petitioner's contentions are without merit and denies the Petitioner's petition on this ground.

In Count 11 of the Petitioner's petition as amended, the Petitioner alleges that his constitutional rights were violated in that he was denied effective assistance of counsel by the system and practice of appointment of counsel for indigent persons in capital cases in Georgia. He further alleges that by historical practice in Georgia, appointed counsel in capital cases are underpaid or given no assistance, such as investigators or expert witnesses. As a result, virtually no court appointed counsel renders anything approaching assistance of counsel in capital cases. The Petitioner, at the habeas corpus hearing, did not produce any evidence concerning this allegation. The burden of proof is upon the Petitioner to prove each and every allegation concerning the violation of his constitutional rights. Smith v. Smith, 228 Ga. 136 (1971). The Court therefore finds, as the Petitioner has failed to carry the burden of proof as required by him, that the petition is without merit and denies the petition on this ground.

The Petitioner, in Count 12 of his complaint as amended, alleges that his constitutional rights were violated in that his conviction and death sentence was imposed in violation of the Fourth, Fifth, Fourteenth Amendments to the United States

Constitution because on the mandatory appeal of the death sentence, counsel for the State, but not counsel for the Petitioner, who was not present, was requested to file a supplemental brief on an issue in which the court ultimately split four to three. The Petitioner contends that the State did brief that issue without the Petitioner or his counsel having noticed that the issues were being briefed and therefore resulted in a receipt of an ex parte brief by the court. The Court finds that the Petitioner's petition is without merit, as each party has a right to file supplement briefs to the Georgia Supreme Court. This is not considered as an ex parte communication with the Court, as both parties enjoy that right until the rendering of a decision under the rules and regulations of the Georgia Supreme Court. Georgia Supreme Court Rule 17(A) (1975). The Court further finds that a copy of the supplemental brief was sent to the Petitioner's counsel prior to the sending of the decision. The Court therefore finds that the Petitioner's contention is without merit and denies the petition on this ground.

In Count 13 of the Petitioner's petition for habeas corpus relief as amended, the Petitioner alleges that his conviction and death sentence was imposed in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States because the argument of counsel to the jury concerning the penalty to be imposed was not transcribed without notice or consent of the Petitioner or his counsel, thus denying the Petitioner meaningful appellate review of his death sentence.

In the trial of all felonies, the presiding judge shall have the testimony taken down by the court reporter, and the court reporter shall exactly and truly record the testimony and proceedings in the case, except the argument of counsel. Ga. Code Ann. § 27-2401. The Georgia Courts have held that the

closing argument of counsel should be taken down in a case in which the State is seeking the death penalty, even though such requirement is not set forth in the statute. However, the Court was not willing to accept the proposition that the failure to transcribe the closing arguments of counsel required the death penalty sentence to be automatically set aside. The Court requires that the Petitioner demonstrate some form of harmful prejudice resulting from the failure of the court reporter to transcribe the closing arguments. This type of evidence would include some form of evidence that the prosecuting attorney made some objectionable statements in the closing arguments to the jury. Stephens v. Hopper, 241 Ga. 596 (1978). The Petitioner, at the habeas corpus hearing, failed to produce any evidence that the district attorney made any objectionable statements to the jury in the sentencing phase. The burden of proof is upon the Petitioner in his habeas corpus proceeding to establish the factual basis of his contentions of the violation of his constitutional rights. Sims v. Smith, supra. The Court finds, as the Petitioner has failed to meet the required burden of proof, that the contention of the Petitioner is without merit, and therefore denies the relief prayed for by the Petitioner in his complaint.

In Count 14 of the Petitioner's petition for habeas corpus relief as amended, the Petitioner alleges that his constitutional rights have been violated because the statutory aggravating circumstances found by the jury recommending the death penalty is unconstitutionally overbroad and vague. The Petitioner further alleges that the statute is unconstitutionally applied in the State of Georgia.

The United State Supreme Court has held that statutory aggravating circumstances in Ga. Code Ann. § 27-2534.1(b)7 is not unconstitutional on its face. Gregg v. Georgia, 428 U.S. 153 (1976). In a later opinion; however, the Justices of the United States Supreme Court has held that the aggravating circumstance set out in Ga. Code Ann. § 27-2534.1(b)(7) is being applied unconstitutionally in certain cases, as the sentences in these cases were inflicted in an arbitrary and capricious manner. Godfrey v. Georgia, 446 U.S. ____, 100 SC 1959 (1980).

In light of this decision, the Georgia Supreme Court set forth clear and objective standards to be used in applying Ga. Code Ann. § 27-2534.1(b)(7), Hance v. State, 245 Ga. 856 (1980). The statute has been determined to require that the jury or court find not only that the murder is outrageously or wantonly vile, horrible or inhuman, but in addition, the facts of the case must show either an aggravated battery to the victim, torture of the victim, or depravity of mind of the defendant. Hance v. State, supra.

Evidence of psychological abuse by the defendant to the victim before death, where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm, may amount to torture of the victim, and it will also support a finding of depravity of mind of the defendant. Hance v. State, supra.

The evidence produced at trial would permit the jury to find the aggravating circumstances set forth in Ga. Code Ann. § 27-2534.1(b)(7). The evidence showed that the Petitioner and his co-defendant pulled the victim out of the vehicle, took ninety dollars from his wallet and told him that they

were going to kill him. The Petitioner and the two co-defendants then took off the victim's shirt and tied it around the victim's head like a blindfold. The victim was begging for his life when the Petitioner placed the shotgun next to the head of the victim and fired the weapon. The Petitioner and his co-defendants then took the money they had robbed from the victim and used the money to eat a meal soon after the murder of the victim. (TT, p.132). The facts of this case would authorize the jury to find that the murder was outrageously or wantonly vile, horrible or inhuman, and that it involved torture or depravity of mind. The Court therefore finds that the Petitioner's contentions are without merit and denies the petition on this ground.

In Count 15, 16, and 17A of the Petitioner's amended petition, Petitioner alleges that his constitutional rights have been violated in that the trial judge failed to charge on the binding recommendation of the jury upon the trial judge, that the trial judge failed to charge properly on the meaning of mitigating circumstances, that the trial judge failed to charge on the balancing of any mitigating circumstance and aggravating circumstance, and further f 'led to charge properly on the meaning of aggravating circumstances as set forth in Ga. Code Ann. § 27-2534.1(b)(7).

The Georgia Supreme Court has already decided these issues against Petitioner on direct appeal. These issues cannot now be reviewed by the habeas corpus court unless the Petitioner can produce evidence that the facts or law has changed since the opinion was rendered by the Supreme Court. Brown v. Ricketts, 233 Ga. 809 (1975); Elrod v. Ault, 231 Ga. 750 (1974). The Petitioner has failed to produce any evidence that would show

that the factual situation has since changed from the date of the Georgia Supreme Court opinion. The decision cited by the Petitioner, Lockett v. Ohio, 98 S.Ct. 2954 (1978), has not changed the law in Georgia concerning the language used to charge the jury during the penalty phase of the criminal trial. Redd v. State, 242 Ga. 876 (1979). The Court therefore finds that the Petitioner's contentions are without merit and denies the petition on this ground.

The Petitioner, in Count 17 of his petition as amended, alleges that his constitutional rights have been violated in that the trial court refused to admit relevant hearsay evidence concerning mitigating circumstances during the innocence-guilt phase of the trial. The trial judge sustained the district attorney's objection to the trial counsel's question to Deputy J. B. Dykes of the Richmond County Sheriff's Department about what the Petitioner had told another law enforcement officer, outside the presence of Officer Dykes, that would have been evidence of coercion; therefore, evidence in mitigation. The trial counsel was able to introduce this evidence at a later time as the trial court permitted the Petitioner's trial counsel to call the second officer for cross-examination purposes only.

The United States Supreme Court has concluded in the past that the Eighth and Fourteenth Amendments require that the sentencer in all but the rarest kind of capital case not be precluded from introducing as a mitigating factor, any aspect of defendant's character or record, or any other circumstance of the offense that the defendant offers as the basis for a sentence less than death. Lockett v. Ohio, supra. That court has further held that evidence which is otherwise inadmissible under the Rules of Evidence is to be admissible in

all instances, if offered as evidence of mitigation in the sentencing phase of a capital felony trial, as the evidence may be highly relevant to a critical issue in the sentencing phase of the trial. Green v. Georgia, 99 S.C. 2150 (1979); Collier v. State, 242 Ga. 553 (1979).

The evidence, which was found to be inadmissible by the trial court under the grounds of hearsay unlike the situation encountered in the cases cited above, was attempted to be introduced during the innocence/guilt phase of the Petitioner's trial. The hearsay evidence in this case during the innocence/guilt phase of the trial is not relevant to the critical issue in that portion of the trial, being the innocence or guilt of the accused. This Court further finds that even had the issue been improperly ruled inadmissible, that any such error would be harmless, as the trial counsel was able to introduce the evidence at a later time without any injury to Petitioner. The Court therefore finds that the Petitioner's contention is without merit and denies the relief prayed for by the Petitioner.

In Count 18 of the Petitioner's complaint as amended, the Petitioner further alleges that his constitutional rights have been violated in that the Petitioner's statements were improperly admitted, as they were involuntary and should have been excluded as the fruit of an unlawful arrest where there was only conclusionary testimony that the information supporting the proper cause was reliable, that no warrant was obtainable for the day of the arrest in Petitioner's home, although the police conceived the facts were demonstrated in time to secure a warrant, and the trial court declined to rule on the legality of the arrest. The Georgia Supreme Court has already ruled upon this issue against the Petitioner, and therefore the habeas corpus court

is unable to review the findings of the Appellate Court. Brown v. Ricketts, supra; Elrod v. Ault, supra. The Court therefore finds that Petitioner's contentions are without merit and denies the petition on this ground.

In Counts 19, 20, and 21, the Petitioner in his complaint as amended alleges that his constitutional rights have been violated in that his death sentence was imposed pursuant to a verdict of a jury selected through procedures that systematically excluded from jury service all persons who have conscientious or religious scruples against capital punishment; and therefore, as a result, the jury did not constitute a representive cross-section of the community.

The trial judge, during the voir dire examination of the jury, asked all of the prospective jurors the following question: "Are any of you conscientiously opposed to capital punishment? If so, let that fact be known." A juror, Betty Pappas, at that time raised her hand and the Court asked her the following question: "Would your reservations about capital punishment prevent you from making an impartial decision as to the defendant's guilt?" The juror then answered in the affirmative, and the trial court asked the following question: "Are your reservations about capital punishment such that you could never vote to impose the death penalty?" After the juror had again answered in the affirmative, the juror was asked, "Are your reservations about capital punishment such that you would refuse even to consider its imposition in the case before you?" The juror having answered in the affirmative, the Court then asked the final question as follows: "Are you irrevocably committed, before the trial has begun to vote against the penalty of death regardless of the facts and circumstances that might emerge in court proceedings?" The juror having answered all of the questions in the affirmative, the

court then excused the juror for cause.

The sentence of death cannot be carried out if the jury imposing or recommending the death penalty was chosen by excluding jurymen for cause simply because they voiced general objections to the death penalty, or expressed conscientious or religious principals against its infliction. Such a juryman cannot be excluded unless he makes it unmistakely clear he would automatically vote against the death penalty in the case regardless of the evidence that might be developed. This qualifying of a jury protects against bias during both phases of the bifurcated trial. This type of qualification of jurors assures that during the guilt-innocence phase of the trial that the jurors, who are unable to render an impartial verdict because of their opposition to capital punishment, are excluded. The qualifying of the jury further protects the sentencing phase of the trial and it assures that those jurors who although able to render an impartial verdict as to the defendant's guilt are excluded because their opposition to capital punishment makes it impossible for them to consider the death penalty in the case, regardless of the evidence. Witherspoon v. Illinois, 391 U.S. 510 (1968); Redd v. State, supra. The questions asked by the trial court of a juror have been approved by the Georgia Supreme Court in a capital felony case. Redd v. State, supra. The juror's responses satisfy the test as set out above, and this Court finds that the Petitioner's contentions are without merit and denies the relief prayed for on this ground.

The Petitioner, in Count 22 of his petition as amended, alleges that his constitutional rights have been violated as he was indicted and sentenced to die by a jury that did not

reflect a cross-representation of the community and was not impartial in fact, but was unrepresentative and biased in favor of the prosecution as to the Petitioner's guilt of the crimes with which he was charged. The Petitioner, during the habeas corpus proceedings, failed to produce any evidence on this allegation. The burden of proof is upon the Petitioner to prove his allegation of the violation of his constitutional rights. Sims v. Smith, supra. The Petitioner having failed to fulfill that burden, the Court therefore denies the Petitioner's contention on that ground.

In Count 23 of Petitioner's complaint as amended, the Petitioner alleges that his conviction and death penalty was unconstitutional in that the prosecutor exercised his peremptory challenges in a racially biased manner, which resulted in the exclusion of members of the black race from serving on the jury in violations of the Sixth and Fourteenth Amendments of the United States Constitution.

The Petitioner has not brought forth any evidence on this issue and thus fails to meet the burden of proof as required of him. Sims v. Smith, supra. Even if there was evidence showing discrimination in the practice of the prosecutor, the Georgia Supreme Court has ruled that the practice would not be in violation of Petitioner's constitutional rights because of the nature of the peremptory challenges. The constitutionality of the Georgia Statute authorizing peremptory jury challenges has not been attacked, and as the statute is valid, the district attorney may use such challenges in his discretion. There is a presumption that the prosecutor is using his challenge in a fair and impartial manner. Willis v. State, 243 Ga. 185 (1979); Jordan v. State, 235 Ga. 732 (1975). The Court therefore finds

the Petitioner's contention is without merit and denies the petition on this ground.

The Petitioner, in Count 24 of his petition as amended, alleges that his constitutional rights have been violated in that his conviction and death sentence was imposed unconstitutionally because he was indicted by a grand jury from a grand jury pool from which several classes of persons were systematically excluded.

The claim that the grand jury was unconstitutionally composed must be presented to the court in a timely manner in order to preserve the objection. The failure of the Petitioner to make the timely objection amounts to a waiver of the right to do so. Patterson v. Balkcom, 245 Ga. 563 (1980); Young v. State, 232 Ga. 285 (1974); Miller v. State, 224 Ga. 627 (1968). The Petitioner, in order to bring forth his objection at this time, must show "cause" for the failure to challenge the composition of the grand jury at the time of the trial. Ga. Code Ann. § 50-127(1). The Petitioner, at the habeas corpus hearing, failed to produce any evidence on this matter. The burden of proof is upon the Petitioner to prove the alleged violation of his constitutional rights. Sims v. Smith, supra. The Court therefore determines the Petitioner's contentions are without merit and denies the relief prayed for in this petition.

The Petitioner, in Count 25 of his complaint as amended, alleges that his constitutional rights have been violated in that his conviction and death sentence was imposed in violation of the rights guaranteed by the Constitution of the United States and the Constitution of the State of Georgia because the Petitioner was convicted and sentenced by a traverse jury

from a traverse jury pool from which the following classes in the county were systematically excluded: (a) young adults, age 18 to 30; (b) blacks; (c) blacks, age 18 to 30; (d) students; (e) military personnel; (f) poor people, and (g) operators of one's personal business. The Petitioner further alleges that the exclusion of these classes was caused by the discriminatory intent evidenced by the Richmond County jury list, which the Petitioner states on his belief reveals a history and pattern of intentional, discriminatory, and systematic exclusion of these classes.

The complaint that the traverse jury was unconstitutionally composed must be presented to the court in a timely manner in order to preserve the objection. Failure of the Petitioner to make a timely objection would amount to a waiver of his right to do so. Patterson v. Balkcom, 245 Ga. 563 (1980); Young v. State, 232 Ga. 285 (1974); Miller v. State, 224 Ga. 627 (1968). The Petitioner, in order to bring his objection at this time, must show "cause" for the failure to challenge the composition of the traverse jury, and further show that there was actual prejudice in the alleged exclusion of certain class of people from the jury list. Francis v. Henderson, 425 U.S. 536 (1976); Ga. Code Ann. § 50-127(1). The Petitioner, at the habeas corpus hearing, failed to produce any evidence showing that "cause" exists for the habeas corpus court to allow the Petitioner to permit the Petitioner to bring forth his claim at this time, nor does the Petitioner bring forth any evidence showing actual prejudice to the Petitioner at the time of the trial. The burden of proof is upon the Petitioner to prove the alleged violation of his constitutional rights. Sims v. Smith, supra. The Court therefore finds that the Petitioner's contentions are without merit and denies the petition on this ground.

The Georgia Law requiring the jury commissioners to select juries only from the voter registration rolls has been alleged, in Count 26 of Petitioner's petition as amended, to have violated his constitutional rights because that selection process per se prohibits a representative cross-section of the community.

The requirements that the Petitioner would have to fulfill in making out a prima facie case of jury discrimination are two fold. The Petitioner must first prove that an opportunity for discrimination exists on the ground that the source from which the potential jury was drawn was in some form biased, and second, that the use of such an infected source produced a sufficient disparity between the percentages of the eligible groups allegedly excluded from the jury list that are found present in this source, and the members of the groups actually appearing on the Petitioner's grand and traverse jury panel. The showing by the Petitioner must show a large disparity between those eligible and those actually chosen, and proof that there was purposable discrimination. Pass v. Caldwell, 231 Ga. 192 (1973). The Petitioner has failed to produce any evidence showing any significant disparity between the percentages of groups found present in the jury registration list and the groups actually appearing on the Petitioner's grand and traverse jury panels. The burden of proof is upon the Petitioner to prove the violation of his constitutional rights. Sims v. Smith, supra. The Court therefore finds that Petitioner's contentions are without merit, and therefore denies the petition on this ground.

The Petitioner, in Count 27 of the petition as amended, alleges that his constitutional rights have been violated

because he was convicted and sentenced by a jury composed pursuant to Ga. Code Ann. § 59-112(b), which allegedly arbitrarily singles out women, including those without young children, as being specically exempt from jury service.

The Georgia statute complained of in the Petitioner's petition does not automatically exclude women from jury service. The Georgia statute permits the jury commissioners, if at any time it appears that the jury list is not a fair representative cross-section of intelligent and upright citizens of the county, to supplement such list by going into the county and personally acquainting themselves with other citizens of the county that are intelligent and upright citizens. Accepting the view that the Sixth Amendment affords the defendant in a criminal trial an opportunity to have a jury drawn from a cross-representative of the community, it is no longer tenable to hold that women as a class may be excluded or give automatic exemption based solely on sex if the consequences is that the current jury panels are almost totally male. When considered with the entire scheme selecting prospective jurors, the affect of Ga. Code Ann. § 59-112(b) could not result in the jury almost totally male. Zirkle v. State, 235 Ga. 289 (1975). The court therefore finds that the Petitioner's contention is without merit and denies the petition on this ground.

The Petitioner, in Count 2[illegible] of his petition as amended, alleges that his conviction and sentence was imposed in violation of his constitutional rights because he was convicted and sentenced by a jury composed pursuant to Ga. Code Ann. § 59-112(b)

which arbitrarily single out women who are housewives with children 14 years of age or younger for a special exemption from jury service, whether or not in a particular case such a woman is customarily responsible for her children, or whether or not her children would interfere with her responsibility to serve on the jury, and without regard to men who are similarly situated. The Georgia Supreme Court, in considering this statute, has held that the trial judge, in excusing a juror who is a housewife with children 14 years of age or younger, does not violate the Sixth and Fourteenth Amendment of the United States Constitution. They recognize that a State may have an important interest in assuring that those members of the family reponsible for the care of children are available to do so. An exemption properly tailored to this interest of the family would survive a fair cross-section challenge. Willis v. State, 243 Ga. 185 (1979). The Court therefore finds that the Petitioner's contertion is without merit and denies the petition on this ground.

In Count 29 of the Petitioner's petition as amended for habeas corpus relief, the Petitioner alleges that his constituional rights have been violated because he was convicted and sentenced by a jury that was composed by a person charged with processing applications from prospective jurors in Richmond County seeking to be excused from jury duty, and that person conducted no investigation of alleged excuses offered by the prospective jurors, therefore exacerbating the exclusionary policies outlined in Count No. 27 and 28 above. The Petitioner has failed to produce any evidence concerning this allegation. The burden of proof is upon the Petitioner to prove each and every allegation of the violation of his constitutional rights. Sims v. Smith, supra. The Court therefore finds, as the Petitioner has failed to meet this burden of proof, that his contentions are without merit and denies the petition on this ground.

The Petitioner, in Count 30 of his complaint as amended, alleges that his constitutional rights have been violated because the death penalty is allegedly administered and applied arbitrarily and capriciously in the State of Georgia; and that the Petitioner was sentenced to die, and will be executed, pursuant to an allegedly pattern and practice of wholly, arbitrarily and capricious infliction of the death penalty. The Petitioner further alleges that the death penalty is unconstitutional as the theoretical justifications are groundless and irrational, that the actual infliction of the death penalty in general and in the present case has been reputiated by contemporary standards of decency and dignity, and that the means by which the death penalty is administered to the Petitioner would inflict wanton and unnecessary torture upon him.

The death penalty is a permissible punishment as long as the State upholds its constitutional responsibility by appling the law in a manner that avoids the arbitrary and capricious infliction of the death penalty. The United States Supreme Court and the Georgia Supreme Court has upheld the statute complained of in the petition, as it properly channels the jury's discretion by clearly objective standards that provide the trier of fact specific detailed guidelines. The statute also provides for a rational review process in imposing a sentence of death. Gregg v. Georgia, supra; Godfrey v. Georgia, supra; House v. Stynchcombe, 239 Ga. 222 (1977). The Court therefore finds that the Petitioner's contentions are without merit and denies the petition on this ground.

In Count 31 of the Petitioner's petition as amended, the Petitioner alleges that his constitutional rights have been violated in that the imposition and execution of the Petitioner's death sentence is a cruel and unusual punishment in light of all the relevant facts relating to the offense and offender, including mitigating circumstances. The Court, after considering all of the evidence submitted to the Court, finds that the contentions of the Petitioner are without merit for the same reasons set forth in Count 14 of Petitioner's petition as amended. The Court therefore denies the relief prayed for by the Petitioner in his petition.

In County 32 of the Petitioner's petition as amended, the remaining allegation of the Petitioner, the Petitioner alleges that his constitutional rights have been violated in that the Petitioner's death sentence has been exacted pursuant to a pattern and practice by Georgia's prosecuting authorities, courts, juries, and governor to discriminate on grounds of race, sex, and poverty in the administration of capital punishment. The Petitioner, during the habeas corpus proceeding, failed to produce any evidence on this allegation. The burden of proof is upon the Petitioner to prove each and every allegation concerning the violation of his constitutional rights. Sims v. Smith, supra. The Court therefore denies the Petitioner's contentions and denies the petition on this ground.

After reviewing all of the evidence, this Court concludes that none of the Petitioner's constitutional rights are being violated.

IT IS THEREFORE ORDERED and ADJUDGED that the Petitioner be remanded to the custody of the Respondent for the execution of the Petitioner's death sentence.

IT IS FURTHER ORDERED and ADJUDGED that the Stay of Execution entered by this Court on the 23rd day of July, 1980, be hereby dissolved.

SO ORDERED, this the 25 day of March, 1981.

JOHN R. HARVEY, Judge
Pettnall Superior Court
Atlantic Judicial Circuit

IN THE
SUPREME COURT OF GEORGIA
DECIDED: JUNE 28, 1978
MORGAN V. THE STATE
33046

Nicholson & Nicholson, Chris G. Nicholson, for appellant.

Alphonso Morgan, *pro se.*

Richard E. Allen, District Attorney, Arthur K. Bolton, Attorney General, John W. Dunsmore, Jr., Assistant Attorney General, for appellee.

HALL, *Justice.*

This is the direct appeal of the conviction and death sentence of Alphonso Morgan, who was convicted in Richmond County Superior Court for the armed robbery, kidnapping and murder of James Gray. Appellant was given a twenty year sentence for kidnapping, a concurrent life sentence for armed robbery, and the death penalty for murder.

I. SUMMARY OF THE EVIDENCE

The State presented evidence from which the jury was entitled to find the following:

On August 22, 1976, at 11:30 P.M., the victim James Gray was driving to his job as night superintendent at the Graniteville Company in South Carolina. When he stopped at an intersection, appellant Morgan, Jose High and Judson Ruffin approached Gray's truck. One of the co-indictees got into the truck with Gray, and, pointing a sawed-off shotgun at him, forced the victim to follow Ruffin's automobile. Somewhere in Georgia, the victim was taken out of his truck and put into the trunk of Ruffin's automobile. The co-indictees then drove their victim to the south end of Bush Field in Richmond County.

Morgan and his companions pulled Gray out of the truck, took ninety dollars from his wallet and told him that they were going to kill him. They took off the victim's shirt and tied it around his head like a blindfold. While Gray was begging for his life, Morgan pulled the sawed-off shotgun to his face and pulled the trigger.

II. ENUMERATIONS OF ERROR

1. In his first enumeration of error, appellant complains that the trial court erred in failing to have a hearing on a motion to suppress the oral confession of appellant, and in allowing the confession to be admitted into evidence.

The trial transcript shows that a Jackson v. Denno hearing was held to determine the admissibility of appellant's confession. The State called the arresting officer who testified that appellant was given the Miranda warnings at the time of arrest. Before any more testimony was heard, the jury was excused and the judge heard evidence on the voluntariness of statements made by appellant to the arresting officer. Also considered at that time was the legality of appellant's arrest. At the close of the hearing the judge ruled to allow introduction of the confession. This constituted a ruling that appellant's arrest was legal as well as a decision that the confession was freely and voluntarily given.

Appellant contends that his warrantless arrest was illegal because there was no probable cause to support it, and that his subsequent confession should have been excluded from the jury's consideration on the basis that it was the product of an illegal arrest. See: Brown v. Illinois, 422 U.S. 590 (1975); Wong Sun v. United States, 371 U. S. 471 (1963).

At the time of appellant's arrest, police authorities were involved in the investigation of a number of homi-

cides, rapes, kidnappings and robberies in which the modus operandi was similar. The victims were placed in the trunk of a car and taken to an isolated area, the victims were blindfolded and a shotgun was used to threaten or kill the victims.

Jose High was arrested on Friday evening, August 27, 1976, in connection with the investigation. He confessed to numerous crimes, including the murder of James Gray. High expressly named appellant as being responsible for Gray's murder. This information was learned in the early morning hours of August 28, 1976. Police officers, fearing that appellant might flee if he learned of High's arrest, immediately went to appellant's address as furnished to them by High, and placed appellant under arrest.

In view of the circumstances, we believe that appellant's arrest falls within the purview of Code Ann. §27-207 which authorizes a warrantless arrest of one where it appears that there is likely to be a failure of justice for want of an officer to issue a warrant. There appears to be no question that the police, at the time of arrest, had probable cause to arrest appellant. As the result of High's confession, which incriminating statements were consistent with information the officers had gained from independent investigation, the officers had reasonably trustworthy information to conclude that appellant was involved in the murder of James Gray.

"Whether [an] arrest [is] constitutionally valid depends . . . upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964) Brinegar v. United States, 361 U.S. 98 (1949).

Appellant attaches to his brief an order of the Superior Court of Richmond County sustaining a motion to suppress filed on behalf of Jose High, appellant's co-indictee, challenging High's arrest. This ruling was reversed on appeal to the Court of Appeals in *State v. High*, Ga. App. (Case No. 55212, Decided April 6, 1978), where the court found High's arrest to be based on probable cause at the time it was made and to be legal even though made without a warrant. Therefore, no Wong Sun v. United States, supra, issue is presented by High's confession implicating appellant.

We conclude that the record clearly establishes that police officers had probable cause to arrest appellant, and that due to exigent circumstances there was a likelihood that there would have been a failure of justice had the police delayed in making the arrest of appellant. Appellant's subsequent confession was admissible and it was not error for the trial court to so rule.

2. There was sufficient evidence to sustain the verdict. The general grounds present no basis for reversal. *Cunningham v. State*, 235 Ga. 126 (218 SE2d 854) (1975); *Fleming v. State*, 240 Ga. 142 (240 SE2d 37) (1977).

3. We find no error in the trial court's charge to the jury relating to the sentencing phase of the trial. *Spivey v. State*, Ga. (SE2d) (No. 33135, decided June 8, 1978).

III. DEATH SENTENCE REVIEW

4. After reviewing the entire record and transcript and considering the foregoing enumerations of error, we conclude that the sentence of death imposed on Alphonso Morgan was not imposed under the influence of passion, prejudice or any other arbitrary factor.

5. The jury found the following statutory aggravating circumstance: "The offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Code Ann. §27-2534.1(b)(7). This aggravating circumstance is supported by the evidence.

6. In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder, and we find the similar cases listed in the Appendix support affirmance of the death penalty.

Alphonso Morgan's sentence to death for murder is not excessive or disproportionate considering both the crime and the defendant. Code Ann. 27-2537(c)(3). The verdict is factually substantiated.

Judgment affirmed. All the Justices concur, except Hill, Bowles and Marshall, J.J., who dissent to Division 3 and the judgment.

APPENDIX

MORGAN v. THE STATE

33046

House v. State, 232 Ga. 140 (205 SE2d 217)(1974); McCorquodale v. State, 233 Ga. 369 (211 SE2d 577)(1974); Floyd v. State, 233 Ga. 280 (210 SE2d 810)(1974); Jarrell v. State, 234 Ga. 410 (216 SE2d 258)(1975); Berryhill v. State, 235 Ga. 549 (221 SE2d 185)(1975); Birt v. State, 236 Ga. 815 (225 SE2d 248)(1976); Gibson v. State, 236 Ga. 874 (226 SE2d 63)(1976); Harris v. State, 237 Ga. 718 (230 SE2d 1)(1976); Young v. State, 237 Ga. 852 (230 SE2d 287)(1976); Dix v. State, 238 Ga. 209 (232 SE2d 47)(1976); Blake v. State, 239 Ga. 292 (236 SE2d 637)(1977); Young v. State, 239 Ga. 53 (236 SE2d 1)(1977); Stanley v. State, 240 Ga. 341 (241 SE2d 173)(1977); Thomas v. State, 240 Ga. 393 (242 SE2d 1)(1977).

IN THE

SUPREME COURT OF GEORGIA

MORGAN v. STATE

33046

BOWLES, J., dissenting

I cannot agree with the majority that the trial court's charge to the jury in the sentencing phase was sufficient under the rule we recently set forth in *Spivey* v. *State*, Ga. (SE2d) (Case No. 33135, decided June 8, 1978), and as first formulated in *Fleming* v. *State*, 240 Ga. 142, 147 (240 SE2d 37) (1977).

In *Fleming* the following statements were given in the charge to the jury during the sentencing phase, "[In] the event your verdict is life imprisonment the punishment the Defendant would receive would be imprisonment in the penitentiary for life. And, of course, if you found that there was evidence in extenuation or mitigation then you could fix his punishment at life imprisonment. . . . Now, if you do not find that there was one or more aggravating circumstances, which I've just read to you, then the form of your verdict would be, 'We, the Jury, fix punishment at life.' Now whatever your verdict is—or if you found that there was evidence in extenuation or mitigation, you could fix punishment at life."

We reversed Fleming's death sentence because of a finding that the trial court failed to make clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance.

In *Spivey* v. *State*, supra, we approved the following charge as making clear to the jury that it could recommend a life sentence even though it found a statutory aggravating circumstance: "It is now your duty to deter-

mine, within the limits prescribed by law, the penalty that shall be imposed as punishment for that offense. In reaching this determination you are authorized to consider all of the evidence received by you in open court, and both phases of the trial. You are authorized to consider all facts and circumstances of the case. . . You must first consider and find beyond a reasonable doubt that the . . . murder happen[ed] while in the perpetration of another capital felony . . . If you find that to exist, then you shall so indicate in writing, then you will determine whether or not you will impose the death penalty, and your verdict then will be one of two, 'We the jury recommend the death penalty' or 'We the jury do not recommend the death penalty.' This is a matter for your determination, ladies and gentlemen."

The majority has now gone so far as to approve the following charge given during the sentencing phase of Morgan's trial:

> "Now, ladies and gentlemen of the jury, you having found the defendant guilty of murder, and armed robbery, and kidnapping, the Court will impose sentence with reference to the armed robbery and kidnapping, but you having found the defendant guilty of the offense of murder, it is now your duty to determine within the limits prescribed by law the penalty that shall be imposed as punishment for that offense. In reaching this determination, you should consider all of the evidence received by you in open court in both phases of the trial. You should consider all of the facts and circumstances of the case, including any mitigating or aggravating circumstances.
>
> "Under the laws of this State, every person guilty of the offense of murder shall be punished by death by electrocution, or by life in the penitentiary. In the event that your verdict is life imprisonment, the

punishment the defendant would receive would be imprisonment in the penitentiary for and during the remainder of his natural life. If that be your verdict, you would add, following the verdict already found by you, an additional verdict as follows: We fix his punishment as life imprisonment for the offense of murder, to be served concurrently or consecutively with any other sentence, as you may determine. You may, however, if you see fit and if such be your verdict, fix his punishment as death, which would require a sentence by the Court of death by electrocution. If that be your verdict, you would add following the verdict already found by you an additional verdict as follows: We recommend his punishment as death for the offense of murder.

"I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution for the offense of murder, you must find upon the evidence statutory aggravating circumstance or circumstances sufficient to authorize such penalty."

To my mind, the approval of this charge is to completely erase the standard for review we have set for ourselves in *Fleming* and *Spivey*, and to ignore the spirit of the law as formulated by the legislature in Code Ann. § 27-2534.1. In the instant case I find no suggestion given to the jury that they may nevertheless show mercy to the defendant even though they find a statutory aggravating circumstance.

I cannot with clear conscience affirm the death sentence in this case when the charge here is considered in the light of *Fleming* v. *State*, supra. Therefore, I respectfully dissent to the judgment of affirmance in the punishment phase of the majority opinion.

I am authorized to say that Justice Marshall and Justice Hill concur in this dissent.

THE COURT: All right, sir. All right, is there anything you wish to present on behalf of the defendant?

MR. NICHOLSON: No, Your Honor, except argument.

THE COURT: all right, you may proceed with the argument on behalf of the State.

MR. ALLEN: Thank you, Your Honor.

(Mr. Allen argued to the jury on punishment.)

(Mr. Nicholson argued to the jury on punishment.)

CHARGE OF THE COURT ON PUNISHMENT

Now, ladies and gentlemen of the jury, you having found the defendant guilty of murder, and armed robbery, and kidnapping, the Court will impose sentence with reference to the armed robbery and kidnapping, but you having found the defendant guilty of the offense of murder, it is now your duty to determine within the limits prescribed by law the penalty that shall be imposed as punishment for that offense. In reaching this determination, you should consider all of the evidence received by you in open court in both phases of the trial. You should consider all of the facts and circumstances of the case, including any mitigating or aggravating circumstances.

Under the laws of this State, every person guilty of the offense of murder shall be punished by death by electrocution, or by life in the penitentiary. In the event that your verdict is life imprisonment, the punishment the defendant would receive would be imprisonment in the penitentiary for and during the remainder of his natural life. If that be your verdict, you would add, following the verdict already found by you, an additional verdict as follows: We fix his punishment as life imprisonment for

the offense of murder, to be served concurrently or consecutively with any other sentence, as you may determine. You may, however, if you see fit and if such be your verdict, fix his punishment as death, which would require a sentence by the Court of death by electrocution. If that be your verdict, you would add following the verdict already found by you an additional verdict as follows: We recommend his punishment as death for the offense of murder.

I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution for the offense of murder, you must find upon the evidence statutory aggravating circumstance or circumstances sufficient to authorize such penalty.

I charge you that a finding of statutory aggravating circumstance or circumstances shall only be based upon evidence convincing your minds beyond a reasonable doubt—and reasonable doubt has previously been defined in the first phase of the trial—as to the existence of one or more of the following factual conditions, in connection with the defendant's perpetration of the offense for which you found him guilty. With respect to the offense of murder, they are: The offense of murder was committed while the offender was engaged in the commission of another capital felony, armed robbery; or the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, or depravity of mind, or an aggravated battery to the victim. Now, an aggravated battery is when one maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring him, his body, or a member thereof; or that the offender committed the offense of murder for the purpose of receiving money.

The statutory aggravating circumstance or circumstances that you are authorized to consider will be submitted to you in writing for your deliberations. You must designate in writing in your verdict on the indictment the aggravating circumstance or circumstances which you find to have existed with respect to the offense for which you recommend the death penalty.

Your verdict respecting punishment must be agreed to by all twelve of you.

Now, you may retire to begin your deliberations—but don't begin your deliberations until the bailiff brings you the indictment with your verdict of guilty on it, along with the written statutory aggravating circumstances which you may consider.

You may retire.

(The jury retired to the jury room.)

THE COURT: All right.

(Papers were sent out to the jury.)

THE COURT: All right, we'll be in recess until we hear from the jury.

(Recess.)

(The jury returned to the courtroom.)

THE COURT: Mr. Foreman, has the jury reached a verdict?

THE FOREMAN: We have, Your Honor.

THE COURT: Deliver it to the bailiff, please, sir. Mr. Bailiff, hand it to the clerk. Madam Clerk, publish the verdict.

(The clerk published the verdict as follows: We, the jury, find the defendant guilty as charged. We ask the death penalty. The offense of murder was outrageously and wantonly—I can't read it—horrible and inhuman in that it . . .)

THE COURT: Return it to the foreman and let the foreman read it. Just hand it to him to read.

THE FOREMAN: (Reading) "We ask the death penalty for the offense of murder was outrageously and wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, and aggravated battery to the victim. May God rest his soul."

THE COURT: Is that dated?

THE FOREMAN: Yes, sir.

THE COURT: And signed by you as foreman?

THE FOREMAN: Yes, sir.

THE COURT: All right, do you wish to poll the jury?

MR. NICHOLSON: No, sir.

THE COURT: Let me have that, please, Mr. Foreman.

(The foreman gave the indictment to the Court.)

THE COURT: Is there anything which you wish to say on behalf of the defendant before sentence is imposed?

MR. NICHOLSON: No, sir.

THE COURT: Anything which the defendant wishes to say before the imposition of sentence?

THE DEFENDANT: Yes, sir.

THE COURT: All right, stand up and say it.

THE DEFENDANT: I think it was unfair the way they did it—unfair trial—and I ask for a new trial.

THE COURT: Well, you'll have an automatic appeal. Remain standing there. You having been found guilty as charged in the indictment, it is ordered that you be taken to the county jail to await guard to be sent to the State penitentiary where you

shall be confined at hard labor therein or elsewhere as the Director of the State Department of Corrections or Offender Rehabilitations shall direct for the remainder of your natural life consecutively with any other sentence for armed robbery; and, in addition, for twenty years consecutively with any other sentence for kidnapping. And it is further ordered that you be delivered to the said director for electrocution at such penal institution as may be designated by said director on the 17th day of August, 1977, for murder.

That's the sentence of the Court, and you may take the defendant back to the jail.

Now, ladies and gentlemen of the jury, that will conclude your services for this term, and you are now excused with the thanks of the Court.

(This concluded the proceedings of this case.)

• • • • •

WITNESSES FOR THE STATE:
J. B. Dyas
Inv. Belcher
Marvin Woodward
Inv. J. T. Johnson
Jerry B. Chandler
Opl. C. B. Smith
Lt. J. R. Holmes
Inv. L. D. Stevens
Dr. W. E. Murphy
Dr. J. W. Hitchener
Gov. E. J. Villain

RICHMOND SUPERIOR COURT

THE STATE
vs.
ALFREDO MORGAN
JOSE MARTINEZ RIOS
JUDSON RUFFIN

MURDER
ARMED ROBBERY
KIDNAPPING

The Defendant
ALFREDO MORGAN-STANDS MUTE

RICHARD E. ALLEN, District Attorney

We, the Jury, find the Defendant

Foreman

The jury's verdict on sentence, as recorded on the indictment shown above, read:

"We ask the Death Penalty. The offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

CHARGE TO THE JURY ON SENTENCING IN GODFREY V. STATE*

BY JUDGE WINN

Ladies and gentlemen of the jury it is now your duty to return to the jury room and fix the punishment in this case and to count one and count two. Code Section 26-1101(c) provides "a person convicted of murder shall be punished by death or by imprisonment for life". "Mitigating circumstances are these which do not constitute a justification or excuse for the offense in question but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame. Aggravating circumstances are those which increase the guilt or enormity of the offense, or add to its injurious consequences".

In determining your verdict in this case you shall consider any mitigating circumstances which you find, and you may consider any of the following aggravating circumstances which may be supported by the evidence. That the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. In the event you fail to find an aggravating circumstance or circumstances beyond a reasonable doubt you would fix the punishment at life imprisonment, and even though you find the existence of a statutory aggravating circumstance or circumstances you could recommend a life sentence. In the event you determine

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* 243 Ga. 302, 253 S.E.2d 710 (1979), rev'd in part, 446 U.S. 420 (198).

that your verdict will be a recommendation of death you shall designate in writing the aggravating circumstance or circumstances which you found beyond a reasonable doubt.

Now, this charge which I have given you is typed and is to be sent out with you. You may refer to it to guide you in your deliberations. I also have prepared two verdict forms, one as to count one and one as to count two. Again these forms should in no way intimate or suggest to you what your verdict should or should not be. Your verdict is entirely up to you. It must be unanimous, all twelve of you must agree to your verdict, taking into consideration all or the previous charge which I have given you. You may now return to the jury room to deliberate as to punishment as to counts one and two.

CHARGE TO THE JURY ON SENTENCING IN THE RETRIAL OF REDD V. STATE*

BY JUDGE FULCHER

Now, ladies and gentlemen of the jury, the defendant having been found guilty of the offense of murder, it is your duty to determine the penalty that shall be imposed as punishment for that offense.

Under the laws of this State, every person guilty of the offense of murder shall be punished by death by electrocution or by life imprisonment in the penitentiary. In reaching your determination, you should consider all of the evidence and all of the facts and circumstances of the case, including any mitigating or aggravating circumstances.

Mitigating circumstances are those circumstances which do not constitute a justification or excuse for the crime, such as low intelligence or intoxication, but which may be considered as extenuating or reducing the moral culpability or blame.

In the event that your verdict is life imprisonment, the punishment the defendant would receive would be imprisonment in the penitentiary for and during the remainder of his natural life. In the event that your verdict is a recommendation of death, the defendant would receive -- the punishment that the defendant would receive would be death by electrocution.

---

* The charge in the first trial, given by the same judge who charged the jury in petitioner's case and in virtually the same manner, was held inadequate by the Georgia Supreme Court, 240 Ga. 753, 243 S.E.2d 16 (1978). In the retrial, see 242 Ga. 876, 252 S.E.2d 383 (1979), Judge Fulcher remedied most of the errors present both in the first charge in Redd and in the petitioner's case.

I charge you that before you would be authorized to find a verdict recommending a sentence of death, you must find beyond a reasonable doubt that the State has proved the existence in this case of one or more statutory aggravating circumstance or circumstances contented for by the State and given you in charge by the Court. If you do not find upon evidence that the State has proved at least one of the statutory aggravating circumstance or circumstances contended for by the State and given you in charge by the Court, beyond a reasonable doubt, then you must recommend a sentence of life imprisonment.

I've referred to reasonable doubt, which I will now define. A reasonable doubt means just what it says. It is a doubt of a fair-minded, impartial juror, honestly seeking the truth. It is not a fanciful, arbitrary, or capricious doubt, but is a doubt based upon a reason such as a reasonable man would have and would act upon or decline to act upon in a matter of importance to himself, and which arises from a consideration of the evidence, or from the lack of evidence, or from a conflict in the evidence. If after considering all of the evidence, facts, and circumstances of the case your minds are wavering, unsettled, and unsatisfied, then that is a reasonable doubt under the law.

In your discretion, you may impose a life sentence, even if you find the existence of statutory aggravating circumstance or circumstances, because finding the existence of a statutory aggravating circumstance or circumstances does not compel recommendation of the death penalty.

If you find beyond a reasonable doubt that the State has proved the existence in this case of one or more

of the statutory aggravating circumstance or circumstances contended for by the State and given you in charge by the Court, you would still be authorized to impose a life sentence which is a verdict you may return for any reason, arbitrarily, as a matter of course or as a matter of discretion.

The statutory aggravating circumstances with respect to the offense of murder are: The offense of murder was committed while the offender was engaged in the commission of another capital felony, kidnapping with resulting bodily injury, or the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, or depravity of mind, or an aggravated battery; or the offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit, armed robbery; of the offense of murder was committed for the purpose of receiving money.

The statutory -- well, let me define these offenses to which I have referred.

First, with respect to kidnapping - A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.

And armed robbery - A person commits armed robbery when with intent to commit theft he takes property of another from the person or the immediate presence of another by use of an offensive weapon.

And aggravated battery - A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by

rendering a member of his body useless, or by seriously disfiguring his body or a member thereof.

The statutory circumstance or circumstances that you are authorized to consider will be submitted to you in writing for your deliberation. You must designate in writing in your verdict the aggravating circumstance or circumstances which you find to have existed for which you recommend the death penalty.

The verdict respecting punishment must be agreed to by all twelve of you. If your verdict is life imprisonment, you would express it as follows: We fix defendant's punishment as life imprisonment to be served concurrently or consecutively with any other sentence, as you may desire. If your verdict is a recommendation of death, you would express it as follows: We recommend defendant's punishment as death. Whatever your verdict is, have one of your number that you select as foreman or forelady write it out on the back of the indictment where I have indicated here by the letter "X", date it and sign it as foreman or forelady, and return it into court.

You may retire now, but do not begin your deliberations until the bailiff brings the indictment out to you.

Now, Mr. Bailiff, will you escort the jury to the jury room.

IN THE
SUPERIOR COURT
OF RICHMOND COUNTY, GEORGIA

ALFONSO MORGAN VS. STATE OF GEORGIA	Civil Action No. No. 7244 Motion Docket

"NOTICE OF APPEAL"

Notice of Appeal is hereby given that Alfonso Morgan, Plaintiff above named appeals to the Georgia Supreme Court from the conviction and sentencing of the trial court of Richmond County, Georgia.

Convicting him of murder, kidnap and robbery and sentencing him to die in the electric chair, life and (20) twenty years. This action was entered by the Superior Court of Richmond County, Augusta, Georgia, on the 13th day of July 1977.

Respectfully Submitted

/s/ ALFONSO MORGAN
Alfonso Morgan Pro Se
R.C.C.I. 2-5
P. O. Box 5259
Augusta, GA 30906

Dated July 18, 1977

Notary Public

/s/ JAMES A. PRICE
My Commission Expires:

Notary Public, Richmond Co., Georgia
My Commission Expires Oct. 8, 1977

Reconstructed Version
(Original Follows)

To The Superior Court of Richmond County, Georgia

Alfonso Morgan

vs.

State of Georgia

Notice of Appeal

Notice of Appeal is hereby given Alfonso Morgan, Plaintiff [illegible] from the Court [illegible] Georgia [illegible] and [illegible] the Supreme Court of Georgia [illegible]

Dated: July [illegible] 1977

Alfonso Morgan

A.75

IN THE
SUPERIOR COURT
OF RICHMOND COUNTY, GEORGIA

ALFONSO MORGAN VS. STATE OF GEORGIA	}	Civil Action No.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND APPOINTMENT OF COUNSEL

Plaintiff moves this honorable court for an order appointing (Mr. Archie L. Gleason, 412 Greene Street, Augusta, Ga.) a member of the Georgia Bar to represent him on his appeal because he cannot afford to employ an attorney at the present time.

This motion is based on plaintiff's affidavit in support of his motion to proceed in forma pauperis and for appointment of counsel. Legal authority for appointment and compensation of counsel is 28 U.S.C. Sec. 1915(d) and 18 U.S.C. Sec. 3006A(g) as interpreted in *McClain* v. *Manson*, 343 F. Supp. 382 D. Conn. 1972.

Dated July 18, 1977

Respectfully submitted

/s/ ALFONSO MORGAN
Alfonso Morgan Pro Se
R.C.C.I. 2-5
P. O. Box 5259
Augusta, GA 30906

Notary Public

/s/ JAMES A. PRICE
My Commission Expires:

Notary Public, Richmond Co., Georgia
My Commission Expires Oct. 8, 1977

Reconstructed Version
(Original Follows)

IN THE
SUPERIOR COURT OF
RICHMOND COUNTY, GEORGIA

ALFONSO MORGAN vs. STATE OF GEORGIA	Civil Action No.

CERTIFICATE OF SERVICE

I do hereby certify that I have this date made the proper and necessary service upon the offices of the Clerk of Superior Court by placing a copy herein of notice of appeal and for appointment of counsel and forwarding it in the United States mail addressing it to the clerk of court Miss Helen M. Speltz with sufficient postage affixed thereto.

Respectfully submitted

/s/ ALFONSO MORGAN

Sworn to and subscribed
before me this 18th day of July 1977

Notary Public

/s/ JAMES A. PRICE
Notary Public Richmond Co., Georgia
My Commission Expires Oct. 8, 1977

Filed in office this 22nd day of
July, 1977

/s/ HELEN M. SPELTZ
Clerk

Reconstructed Version
(Original Follows)

In the Superior Court of Atkinson
County, Georgia

Alfonso Morgan

vs.

State of Georgia

Motion for Leave To Proceed In Forma Pauperis And
Appointment of Counsel

[illegible]

[illegible]

Dated: July 16, 1979

[illegible] Alfonso Morgan

[illegible]

[illegible]

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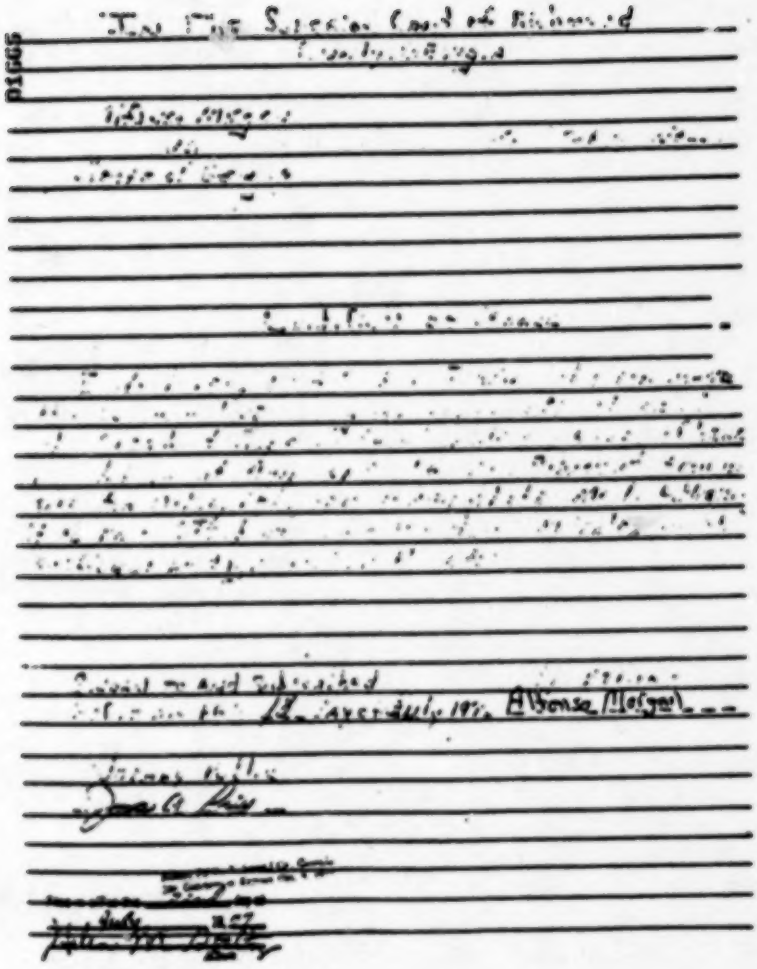

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IN THE
SUPERIOR COURT OF
RICHMOND COUNTY, GEORGIA

ALFONSO MORGAN

vs.

HELEN M. SPELTZ
Respondent

Criminal Case No.
Charges: Murder, Kidnap, Arm Robbery
Sentences: Death, life, 20 years
Date of Conviction: 7/15/77

PETITION FOR COPY OF RECORDS

Comes now the petitioner-defendant in the above styled cause and moves this Honorable Court to issue an order directed to the above named respondent and commanding that the respondent supply the petitioner-defendant with certain documents which have heretofore been filed by him in his capacity officially as clerk of this court and which are required by the petitioner-defendant for the purpose of continuing litigation as good cause for issuing such order he submits the following to wit:

1.) The defendant now petitioner is an indigent person unable to pay the respondent's fees for such documents.

2.) As the defendant in a criminal case, petitioner is entitled to certified copies of the documents below listed as a matter of law.

3.) Petitioner should have been, but has not been served with a copy of

(A) The warrant in this cause.

(B) The indictment in this cause.

(C) Any transcript of any proceeding in which petitioner was a defendant.

(D) The sentence as impose from the bench.

Reconstructed Version
(Original Follows)

Whereas the defendant petitioner is entitled to the foregoing documents described as a matter of law and, whereas the cost of such documents may be taxed against the state.

Wherefore the defendant now petitioner prays that an order be issued as in hereinabove prayed, and this he will ever pray.

Respectfully submitted

/s/ ALFONSO MORGAN
defendant petitioner
R.C.C.I. P. O. Box 5259
Augusta, GA 30906

Sworn to and subscribed before me
this 10th day of August 1977.

/s/ JAMES A. PRICE
Notary Public

My commission expires:
Notary Public, Richmond Co., Georgia
My Commission Expires Oct. 8, 1977

CERTIFICATE OF SERVICE

I do hereby certify that I have this date made service upon the opposite party by placing a copy of this foregoing petition for copy of Record and "Petition for Leave to file and proceed" in forma pauperis in the United States mail with sufficient postage attached thereto.

This Day of 197

/s/ ALFONSO MORGAN
Petitioner Pro Se
R.C.C.I. P. O. Box 5259

Reconstructed Version
(Original Follows)

In The Superior Court Of
Richmond County, Georgia

Plaintiff	Criminal Action No.
v.	Charge: Child Molestation
Name of the Defendant	Date of Offense: 7/15/77
Defendant	Date of Conviction: 7/15/77

Motion for Bond Pending Appeal

COMES NOW the Defendant in the above-styled case and moves this Court to grant him bond pending the appeal of his case to the Georgia Supreme Court. In support of this motion, the Defendant shows the Court as follows:

1. That the Defendant was convicted of Child Molestation on July 15, 1977, and was sentenced to serve twenty (20) years in the custody of the Georgia Department of Offender Rehabilitation.

2. That the Defendant has filed a Notice of Appeal to the Georgia Supreme Court.

3. That the Defendant is not a danger to the community and is not likely to flee the jurisdiction of the Court.

4. That the Defendant has a meritorious appeal.

5. That the Defendant has been a resident of Richmond County, Georgia, for his entire life.

6. That the Defendant has been employed at the same job for the past three years.

7. That the Defendant has been married to the same woman for the past seven years.

8. That the Defendant has no prior criminal record.

9. That the Defendant has been free on bond pending trial in this case.

10. That the Defendant has been a model prisoner while incarcerated in the Richmond County Jail.

11. That the Defendant has been a model prisoner while incarcerated in the Richmond County Jail.

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49. That the Defendant has been a model prisoner while incarcerated in the Richmond County Jail.

50. That the Defendant has been a model prisoner while incarcerated in the Richmond County Jail.

Best Copy Available

Alfonso Morgan

Alfonso Morgan

Best Copy Available

INMATE'S NAME: Alfonso Morgan
INSTITUTION: R.C.C.I.
DATE: Oct. 5, 1977
STATE SERIAL NUMBER:
CITY: Augusta, Georgia

I am presently confined at Richmond County Corrections Institution. I am writing you in request for the transcript pertaining to my case, or any information you can give me as to how I can obtain my transcript. I was tried and sentenced August 22, 1977 and since then have tried to obtain any transcript and indictment papers. My attorney Chris Nicholson has not contacted me since my trial and I have not been able to contact him. It is my opinion that Mr. Nicholson does not intend to assist me in any other legal matters, so it is imperative that I receive my transcript and any other papers pertaining to my case so that I may be able to help myself efficiently.

My mother, Betty Morgan will contact you soon and I would appreciate it if you would cooperate with her in helping me receive my legal papers.

Sincerely,

/s/ ALFONSO MORGAN

The transcript has not been filed. Court is in session every week, therefore, the court reporter has not had time to prepare it.

Reconstructed Version
(Original Follows)

DATE: Oct 5 1977

INMATE'S NAME: Alphonso Morgan STATE SERIAL NUMBER:

INSTITUTION: R.C.S.I. CITY: Augusta, Georgia

Dear Mr. Kelly:

I am presently confined at Richmond County Correctional Institution and am writing you in regard to the transcript pertaining to my case. If any information you can give me as to how I can obtain my transcript. I was tried and sentenced August 22, 1977 and since then have tried to obtain my transcript and indictment before. My attorney Clem Nichols has not contacted me since my trial and I have not been able to contact him. It is my opinion the Mr. Nichols has not tried to assist me in any other legal matters, as it is just his duty to secure my transcript and any other papers pertaining to my case so that I may be able to help myself efficiently.

My mother, Betty Morgan will contact you soon and I would appreciate it if you would cooperate with her in helping me secure my legal papers.

Sincerely,

Alphonso Morgan

The transcript has not been filed. Court is in session every week, therefore, the court reporter has not had time to prepare it.

Best Copy Available

EDWIN D. FULCHER
JUDGE OF THE SUPERIOR COURTS
OF THE AUGUSTA JUDICIAL CIRCUIT
311 CITY-COUNTY BUILDING
AUGUSTA, GEORGIA 30902

August 17, 1977

Mr. Richard E. Allen
District Attorney
The 500 Building
Augusta, Georgia 30902

RE: STATE V. ALPHONSO MORGAN

Dear Sir:

I enclose herewith Petition for Copy of Records in the above matter for your handling and disposition.

Yours very truly,

/s/ EDWIN D. FULCHER
Edwin D. Fulcher

edf/d
Enclosure
Copy to Alfonso Morgan
R. C. C. I.
P. O. Box 5259
Augusta, Georgia 30906

November 17, 1977

Mr. Alfonso Morgan
Richmond County C.I. 2-5
Post Office Box 5259
Augusta, Georgia 30906

Dear Mr. Morgan:

Thank you for your letter of last week.

I noted in your letter that you were anxious for your trial court attorney to contact you concerning your appeal. Generally, the attorney who is appointed to handle your case at trial will also represent you on appeal. Our office does not intervene in cases where a lawyer has already been appointed in a case such as yours, and, moreover, we do not have an office which covers the Richmond County area. Therefore, we will not be able to assist you directly at this time. However, if your attorney fails to contact you after the time for appeal has elapsed, please contact us again at that time, for then we may be able to assist you.

Yours truly,

/s/ BARRY G. SIKES

Barry G. Sikes
Legal Assistant

BGS/dgl

SUPREME COURT OF GEORGIA

ATLANTA, November 21, 1977

The Honorable Supreme Court met pursuant to adjournment.
The following order was passed:

Alfonso Morgan v. The State

It is hereby ordered that counsel for the appellant file an enumeration of errors in this case no later than 4:30 p.m. on November 29, 1977 . Failure to do so will subject you to the sanctions of Rules 14(a) and 34(a) of this Court.

SUPREME COURT OF THE STATE OF GEORGIA,
CLERK'S OFFICE, ATLANTA, November 21, 1977

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

INMATE'S NAME: .....
INSTITUTION: .....
DATE: .....
STATE SERIAL NUMBER: Rec. 12/19/77
CITY: .....

MRS. JOLINE B. WILLIAMS Clerk
Supreme Court of Georgia

I'am writing you to let you know that I have tried to get my transcript from my lawer but I've had [no] resort on my case, and I would like for you to check on some of the evidence on me as they say, they say it was three of us on the crime and I was the only one convicted for the crime, and my lawer gave me no a cooperation and I would like for you all to know that I'am not a wealth man at the moment and I did not committ this crime, and the evidence there was, was on someone else and I became involve also, but the evidence was no good in Court and this no one has been release I want you to know that I am trying in all my ability to help myself on the case I would like for you to investigate this case [first?] before any final decision is made, because my like is in state of Death [unclear word] was not meant for me as a human being, and I have never commited a felony case in my life and behalf of my like I feel that may case down here in Georgia is taking my life for nothing I done and that why I ask you to help me in every way you can, and when I got convicted my lawer never gave me a report are never answered any of my letter, and I know that he a stat apointed, but I would like to know did he file my complank, and never received this as a murder I did'nt committ with 11 whites & 1 Black that could explain how I got arrested, and the D.A. Richard Allend said that I hated white folk so the jury and I would like for you to check into it, and I have evidence on this, on my behalf I

was railroad, and as of now they violated my rights on a speedy trial because of no evidence and all that is being introduced to you I would like to here from you on my case and I was tortued and beating & they said I made statement, but I did not say, and as arresting me they had no warrant of my arrest. So please I am asking you to help me, because I am a young man and care about my life, and they keep asking me to cop out and I said no for knowing I did'nt, not even a line up. They gave me, in my way my lawer and Richard Allend sat me up, because they hadno evidence, and also when I was arrest, the Detective said I made a statement around five men had no time to take it down and only one took the stand without no statement, and a G.B.I. took the stand on behalf that I had nothing to do with the case in Crawford Villi, and I hope I could receive a letter from yoall for help.

Reconstructed Version
(Original Follows)

DATE:

INMATE'S NAME: STATE SERIAL NUMBER: R24 151a/x

INSTITUTION: CITY:

Mrs Debra G Williams Clerk
Supreme Court of Georgia

I'm writing you in hopes that I can get my transcript from my Lawyer but I've had access to my Case, and I would like for you to check on some of the evidence in my case. Like say it was Two of us at the Crime and it was the only one Convicted for the Crime, and my Lawyer gave me no opportunity and I would like for you all to know that I've been a Model Inmate at the moment and I did not Commit this Crime and the evidence Will prove, that no person like me and I've been locked Up for no Reason I cannot afford to have that Crime I cannot afford to have that I am trying in the only ability to help my self on the case I would like for you to investigate this Case Cause before any Good Lawyer he wants Because my life is in Stake of Death which means too much for me to be a Murder Thing, and I have more Conviction a Felony Ever in my life.

DATE: _____

INMATE'S NAME: _____ STATE SERIAL NUMBER: _____

INSTITUTION: _____ CITY: _____

and behalf of my life i quit with
my Court Order for in Escape is taking
my life for nothing i done and that
why i let you be life you in every way
you Can, and when i get Convicted my
Lawyer never gave me a report on every
accused any of my letter and i know i
that be a state appointed but it would
like it been did like he file my
Complaint, and never recieved this as
a Injustice i did'nt Commit with
11 whites + 1 Black that Could explain
for i got arrested, and the D.A. Called
Allred said that i hated white girl in
the jury and i would like for you to
C.I.D. Late it and i have witness on
this on my behalf i were cuffed, and
se of cop Beat violated my right on a
speedy Trail Excuses of the evidence and
all that is being withheld by cops it
would like i like for you or my Case
but i was Tortured and Beaten I they said
i made statement, but I didn't eat Long
and as arresting cop they had my wallet
I may ainte Jo please i ae crying you to
help me, Because I'm a dying man for Cop
shot my life,

and they kept asking me to repeat
and I did so for knowing I didn't
not was a liar as they said me, in my
way they knew and Richard, Clyde also
me as because they had me swear, and
else else. I even knew the Detective said
I made a statement around him was had
to Have to take it down and why we
took the stand without be sworn and
a G.B.I. had the stand on behalf that
it had nothing to do with the case in
Crawford Hill, and I hope I could receive
a little from you all for help

December 16, 1977

Mr. Chris Nicholson
The 500 Building
Augusta, Georgia 30902

In re: Case No. 33046
Morgan v. The State

Dear Mr. Nicholson:

The Court has directed me to notify you that you are required to file the appellant's briefs in the above case in this Court not later than 4:30 p.m., December 30, 1977, or be subject to the sanctions of Rule 34 of this Court.

Yours truly,

Mrs. Joline B. Williams, Clerk

JBW:bc

cc: Arthur K. Bolton, Atty. Gen.
Attn: John W. Dunsmore, Jr.

Richard Allen, Dist. Atty.

IN THE SUPREME COURT OF GEORGIA

ALPHONSO MORGAN, Appellant	)	
VS.	)	CASE NO. 33046
STATE OF GEORGIA, Appellee	)	

BRIEF FOR APPELLANT

CHRIS G. NICHOLSON
NICHOLSON & NICHOLSON, P. C.
THE 500 BUILDING
ROOM 120
AUGUSTA, GEORGIA 30902

ATTORNEY FOR APPELLANT

IN THE SUPREME COURT OF GEORGIA

ALPHONSO MORGAN, Appellant	)	
VS.	)	CASE NO. 33046
STATE OF GEORGIA, Appellee	)	

BRIEF FOR APPELLANT

PART I

STATEMENT OF FACTS

Appellant was charged with the offenses of armed robbery, kidnapping and murder of James Gray on August 22, 1976 (R4). Appellant was jointly indicted with three other individuals namely: Jose High, Judson Ruffin and Nathan [illegible] was allegedly kidnapped by the above in South Carolina and taken to Bush Field Airport in Richmond County, Georgia, where he was robbed and murdered.

The State proceeded with Jerry Chandler as its first witness (T-75). He was a security guard at Bush Field and found the body of Mr. Gray on August 23, 1976, at Bush Field (T-76). Upon cross-examination he testified he knew of no evidence of the crime itself (T-81).

Carlton Weathersbee was the second witness called by the State (T-82). He testified being a personal friend of Mr. Gray and identified his body at the morgue at University Hospital (T-82-83). Upon cross examination he knew nothing of the facts of the case (T-84).

Ted Wright was the third witness called by the State

(T-85). He is a pathologist at Dwight David Eisenhower Medical Center and testified to the autopsy performed (T-86-90). Dr. William Murphy was the fourth witness called by the State and testified as to the examination of the body of Mr. Gray (T-92-95).

The fifth witness called by the State was Investigator J. B. Dykes of the Richmond County Sheriff's Department (T-95-145). Mr. Dykes testified he arrived on the scene at Bush Field and his subsequent investigation (T-97-102). He found a tennis shoe tract and stated it was from Jose High. He further testified he arrested Alphonso Morgan on August 23, 1976, at 501 E. Espinosa Street (T-108). At this time District Attorney Richard Allen asked for a matter to be discussed outside the presence of the jury (T-108). Mr. Allen proceeded with Mr. Dykes and questioned him about the arrest (T-109). He testified he arrested the defendant and gave him his Miranda rights in order to show the confession was voluntary.

Defense counsel at the time of the Jackson v. Denno hearing requested the court to determine upon what probable cause [illegible] made and if arrest was illegal, any statement subsequ[illegible] to an illegal arrest would be inadmissible (T-110). Mr. Allen agreed with this and the Court proceeded.

Mr. Dykes then went into why the arrest was made (T-111). He stated the department was investigating a number of homicides, rapes, kidnappings and robberies which seem to be related (T-111). Mr. Dykes further stated the reason the defendant was arrested:

"Q. How about telling us why you arrested this defendant?

A. As we had Jose High in custody, we were questioning him; he had confessed to the numerous crimes; he had named Alphonso Morgan as being involved in those crimes, including this murder case.

Q. How reliable was the information given by Jose High in

the confessions as judged against facts gathered by you independently?

A. It was very reliable.

Q. All right, sir. Now, he named who as doing what?

A. Alphonso Morgan, as being the one involved in this case, in the kidnap-rape case, the other murder cases -- two other murder cases. He named Alphonso Morgan, and stated he lived at 501 E. Espinosa. We had to go and arrest him immediately because we had just arrested Jose High that night, and we were afraid that Mr. Morgan would be gone when he found out that Jose High was under arrest.

Q. Let me get the time sequence. I cut you off when you were talking about Jose High's arrest. What time, what date, was he arrested, Jose High?

A. Jose High was arrested on the 27th day of August, 1976.

Q. What day of the week was that, do you recall?

A. Friday -- Friday afternoon -- Friday evening.

Q. About time did you make the arrest of Jose High?

A. It was just getting dark; it was just dark at that time.

Q. All right, sir. And this was Daylight Saving Time, is that right?

A. Yes.

Q. All right, sir. And what time was it that Jose High told you about this defendant's involvenent in not only the case we're trying now but the other cases?

A. It was close to around 3:30 or 4:00 o'clock in the morning. It was almost daylight.

Q. All right, sir. Excuse me one second. Now, is that basically the information on which you went out and made the arrest of this defendant?

A. Yes." (T-111-113)

Mr. Dykes further testified he arrested defendant and defendant declined to make a statement at the time of his arrest.

Upon cross-examination the following question was asked and response given:

"Q. What independent facts did you have that caused you to arrest him?

A. During the lineup portion on arresting Jose High, one of the people that picked Jose High out said, 'The other man's name is something like Alonzo,' that was there. And then when Jose High, during his confession, kept using the name 'Fonz,' -- 'Fonz did this' -- and they were consistent with things that we had found at the scene of the crimes." (T-117-118)

He further testified:

"Q. Did you find any physical evidence, like a shotgun that you have back here?

A. No.

Q. You didn't find any of that at his house?

A. No, sir. I did not.

Did you have an arrest warrant at the time?

No, sir, we did not.

Q. Y'all just went there and arrested him, correct?

A. We had to get there and get him before he found out that Jose High was under arrest." (T-118-119)

The trial judge made a preliminary finding that prima facie the statement was voluntarily made, but made no ruling as to the suppression of the oral confession (T-122-123).

Mr. Allen proceeded with Mr. Dykes before the jury concerning defendant's arrest and the Miranda rights given. Defense

counsel renewed the objection as to the illegal arrest and subsequent confession being inadmissible (T-127). Then Mr. Dykes went through a series of questions and propositions in which he tricked the defendant into gaining information when he had none (T-128). He further stated the oral testimony of the defendant (T-131).

There were a series of witnesses to testify as to certain exhibits but none were connected with the defendant directly or indirectly and there were no positive identifications that the defendant was at the scene of the kidnapping or the murder.

The plaintiff rested.

The only evidence presented by the defendant was the cross-examination of the GBI agent, Bob Ingram, concerning the statement given to them by the defendant. The statement contained the oral statement given to Mr. Dykes in material terms and this was the reason for presenting the same (T-196).

The defense rested.

PART II

ENUMERATION OF ERRORS

1. The trial court failed to have a hearing on oral motion to suppress the oral confession of Appellant, and also in not ruling said oral confession and oral evidence gained thereby inadmissible.

2. The evidence did not authorize the verdict.

The Supreme Court of Georgia has jurisdiction of this Appeal as there are capital felonies involved. The charges against Appellant were Murder, Armed Robbery, and Kidnapping (R4).

PART III

ARGUMENT AND CITATION OF AUTHORITIES

The defendant mainly relies upon the failure of the trial court to rule upon the objection of the defendant as to the illegal arrest and the subsequent oral confession gained thereby.

The defendant cites as authority for his contention that the oral confession was gained by an illegal arrest; therein the case of Brown v. Illinois, 422 U.S. 590, decided on June 26, 1975, the petitioner was arrested as in the case at bar without probable cause and without a warrant and under circumstances indicating that the arrest was investigatory, and then Brown made [illegible]ody inculpatory statements after he had been given his Miran[illegible]nings; thereafter Brown was indicted for murder and filed a pretrial motion to suppress the statements. The motion was overruled in the trial court and petitioner was convicted. The Supreme Court stated that the question whether a confession is voluntary under Wong Sun v. United States, 371 U.S. 471, must be answered on the facts on each case. The court stated that, "though the Miranda warnings are an important factor in resolving the issue, other factors must be considered; and the burden of showing admissibility of in-custody statements of persons who have been illegally arrested rests on the prosecutor." The court held that the State failed to state the burden in this case in showing that petitioner's statements were admissible under Wong Sun.

The issue in Brown v. Illinois and in the case at bar are the same: whether evidence of statements were properly admitted or should have been excluded after the defendant was arrested without

probable cause and without an arrest warrant in which statements would be fruits of an illegal arrest. The detectives who arrested Brown went through the same examination to gain the confession after the illegal arrest as Mr. Dykes did to gain an oral confession from Alphonso Morgan. The officers questioned Brown concerning certain statements, but the statements were reduced to writing and in the case at bar was not reduced to writing and was presented as an oral confession to the trial judge and the jury. All of these statements were made pursuant to giving the Miranda warnings in the Brown case. Brown did confess to the murder as contended in the case at bar. The State Court relied upon the facts that the Miranda warnings served to break the connection between the illegal arrest and the giving of the statements, and that the defendant's act in making the statements was "sufficiently an act of free will to purge the primary taint of the unlawful invasion"; therefore, the State Court upheld the murder conviction. The Supreme Court in reversing the case used the Wong Sun case as precedent. In Wong Sun a statement was given by a defendant, Toy, after being arrested and Toy's answer lead the investigator to question another, namely: Johnny Yee, and Yee gave the investigator a name of an individual called "Sea Dog". The defendant, Toy, said that "Sea Dog" was Wong Sun. The investigator went to Wong Sun's house and arrested him and subsequently to the arrest, Wong Sun voluntarily gave an unsigned confession. The facts of the case at bar up to this point are comparably the same.

Jose High, who is a co-defendant, gave a confession to Mr. Dykes to the fact that Alphonso Morgan was involved in the murder, kidnapping, and armed robbery of Mr. James Gray.

The Court in Brown summarized the holding in Wong Sun as "This court ruled that Toy's declarations and the contraband taken from Yee were the fruits of the agents' illegal action and should

not have been admitted as evidence against Toy. Id., at 484-488, 83 S.Ct., at 416. It held that the statement did not result from "'an intervening independent act of a free will,'" and that it was not 'sufficiently an act of free will to purge the primary taint of the unlawful invasion' Id., at 486, 83 S.Ct., at 416. With respect to Wong Sun's confession, however, the Court held that in the light of his lawful arraignment and release on his own recognizance, and of his return voluntarily several days later to make the statement, the connection between his unlawful arrest and the statement "had 'become so attenuated as to dissipate the taint.' Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307." Id., at 491, 83 S.Ct., at 419. the Court said: "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)." Id., at 487-488, 83 S.Ct., at 417." The court stated that there was an issue between the Fifth Amendment and Fourth Amendment. The court state, on the bottom of p. 601 and top of 602, that "Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken. Wong Sun requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be 'sufficiently an act of free will to purge the primary taint.' 371 U.S. at 486, 83 S.Ct. at 416. Wong Sun thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the

Fourth Amendment." On page 603 the court held that "It is entirely possible, of course, as the State here argues, that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the Miranda warnings, alone and per se, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited. See Westover v. United States, 384 U.S. 436, 496-497, 86 S.Ct. 1602, 16 L.Ed.2d694 (1966)." The Supreme Court then concluded that the State failed to sustain burden of showing admissibility of in-custody statements taken after an illegal arrest. The defendant contends in this case using Wong Sun as precedent as applied would reverse his conviction due to the fact of the inadmissibility of the oral confession after a careful examination of the facts and the only independent evidence that convicted the defendant. There was not other evidence presented in the case that either directly or indirectly proved the case. There was also no other independent evidence to give probable cause for the Sheriff's Department to arrest the defendant. The only evidence is a statement by Jose High that the defendant was involved in the murder of James Gray.

The defendant would like to point out that on the 28th day of October, 1977, the Honorable Edwin D. Fulcher suppressed certain statements made by Jose High, and a copy of said order is attached and at this time said order is on appeal to this Honorable Court. It is defendant's contention that after a review of Judge Fulcher's order that this is the same contention being made by defendant, but defendant did not make his motion previous to trial but made his objection and motion during the time of trial to the oral confession.

The defendant cites as authority the case of Reid v. State,

129 Ga. App. 660, 662, that "If a motion to suppress were held to apply to testimony because it is for some reason inadmissible, the court would be required to hold a pre-trial full scale trial for determining what portions of the testimony or other evidence may be inadmissible upon grounds directed to the court's attention, and even that would not preclude the objecting to it on yet other grounds when it is tendered on the trial. It is simply impractical to test in advance the admissibility of testimony that may or may not be tendered on the trial and a requirement that the court attempt to do so would be intolerable.

When testimony is offered it is the duty of the defendant to make objection to it, stating his ground, at the time. Code §24-3362: Brown v. State, 226 Ga. 114(3)(172SE2d666). The adverse ruling previously made on a motion to suppress as evidence anything obtained by an illegal search does not constitute a ruling on the admissibility of testimony when it is tendered. The testimony may, for reasons not appearing from the motion to suppress, be admissible.

When testimony is tendered an objection must be made, affording the court opportunity to rule upon the admissibility of the testimony upon the grounds then urged and in the context of the matter as it then appears, and failure to make a timely objection to testimony when it is offered results in a waiver of any objection t. ht have been urged. Legg v. Legg, 165 Ga. 314 (140SE868); Holmes v. Burkett, 98 Ga. App. 189, 191 (105SE2d236); Jackson v. State, 108 Ga. App. 529 (133SE2d436). 'All evidence is admitted as of course unless a valid ground of objection is interposed, the burden being upon the objecting party to state at the time some specific reason why it should not be admitted'"; therefore, defendant's motion and objection were timely, and the confession used against him if ruled out would leave no independent facts for the jury to determine that he was guilty. Therefore, defendant concludes that

the arrest was illegal and without probable cause and confession gained thereby should be ruled inadmissible and the case remanded with directions to rule said confession inadmissible.

RESPECTFULLY SUBMITTED,

NICHOLSON & NICHOLSON, P.C.

BY: Chris G. Nicholson

CHRIS G. NICHOLSON
Attorneys for Appellant

The 500 Building, Room 120
Augusta, Georgia 30902

IN THE
SUPREME COURT
OF GEORGIA

ALFONSO MORGAN, *Appellant,* v. STATE OF GEORGIA, *Appellee.*	Case No. 33046 On Appeal from the Superior Court of Richmond County Murder, Armed Robbery, Kidnapping (Death Case)

SUPPLEMENTAL BRIEF
ON BEHALF OF THE APPELLEE
BY THE ATTORNEY GENERAL

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

RICHARD L. CHAMBERS
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

JOHN W. DUNSMORE, JR.
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3358

JOHN W. DUNSMORE, JR.
Assistant Attorney General

RICHARD E. ALLEN
District Attorney
Augusta Judicial Circuit

IN THE
SUPREME COURT
OF GEORGIA

ALFONSO MORGAN, *Appellant,* v. STATE OF GEORGIA, *Appellee.*	Case No. 33046 On Appeal from the Superior Court of Richmond County Murder, Armed Robbery, Kidnapping (Death Case)

SUPPLEMENTAL BRIEF ON BEHALF OF THE APPELLEE BY THE ATTORNEY GENERAL

At the direction of the Court during oral argument held on January 9, 1978, Appellee was requested to file a supplemental brief addressing the adequacy of the lower court's instructions during the sentencing phase of the trial in light of *Hawes v. State,* Ga. (Case No. 32167, decided Nov. 28, 1977), and *Fleming v. State,* Ga. (Case No. 32344, decided Nov. 8, 1977). Before discussing this issue Appellee wishes to correct a statement made during oral argument in which it stated that the Court of Appeals had already heard oral argument regarding an appeal filed on behalf of the State in connection with the lower court's ruling setting aside the arrest of Appellant's co-defendant. *State v. High,* Case No. 55212. Appellee was in error insofar as informing the Court that oral argument had been held before the Court of Appeals in that matter. Oral argument has not been

held, but briefs for both sides have been submitted with the Court. Appellee apologizes for this error and for misleading the Court in this matter.

Recently this Court has been asked by various Appellants to look more closely at the trial court's instructions coming during the penalty phase in those cases in which the state is seeking the death penalty under Ga. Laws 1973, pp. 163, Ga. Code Ann. § 27-2734.1, particularly as to the sufficiency and clarity of those instructions on mitigating and aggravating circumstances which the jurors are to consider before imposing a death sentence. Ga. Code Ann. § 27-2734.1(b)(c). In that connection this Court has held that a jury must be instructed that they are to consider in addition to aggravating circumstances, any mitigating circumstances warranted by the evidence. *Hawes v. State, supra,* but that the mitigating circumstances need not be singled out and specifically listed, a general charge on mitigating circumstances being sufficient. *Thomas v. State,* Ga. (Case No. 32259, Nov. 28, 1977). Further, a judge during the penalty phase must also make it clear to the jurors that even if they find a statutory aggravating circumstance they may still recommend a life sentence. *Fleming v. State, supra.*

Sub judice, the trial judge specifically instructed the jury:

> "... it is now your duty to determine within the limits prescribed by law the penalty that shall be imposed as punishment for that offense. In reaching this determination, you should consider all of the evidence received by you in open court in both phases of the trial. You should consider all the facts and circumstances of the case, including *any mitigating or aggravating circumstances."* (Emphasis added).

Hawes is not applicable in this instance, since the lower court did instruct on mitigating circumstances.

whereas in *Hawes* such an instruction was totally lacking. Admittedly, while the lower court did not include in its charge information to the jury that they could nevertheless recommend a life sentence even if they found the existence of a statutory aggravating circumstance. *Fleming, supra.* This Court's concern in *Fleming* and instructions similar to that which it took issue with in *Fleming,* is that it is possible for the judge to give too much emphasis on aggravating circumstances, and that in doing so the instruction may appear to the jury that if they find a statutory aggravating circumstance it is mandatory for them to return a sentence to death. In this instance, the charge when taken as a whole permits a life sentence even though an aggravating circumstance may be found. (T. 229-231).

Respectively submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

/s/ RICHARD L. CHAMBERS
Richard L. Chambers
First Assistant
Attorney General

/s/ JOHN C. WALDEN
John C. Walden
Senior Assistant
Attorney General

/s/ JOHN W. DUNSMORE, JR.
John W. Dunsmore, Jr.
Assistant Attorney General

/s/ RICHARD E. ALLEN
Richard E. Allen
District Attorney
Augusta Judicial Circuit

Please serve:

JOHN W. DUNSMORE, JR.
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3358

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

THIS 16th day of January, 1978

/s/ JOHN W. DUNSMORE, JR.
Counsel for Appellee

PERSON(S) SERVED

Mr. Chris G. Nicholson
The 500 Building
Augusta, Georgia 30902

CODE

Report of The Trial Judge

of the

Superior Court of Richmond County, Georgia

The State vs. Alfonso Morgan
(A case in which the death penalty was imposed)

A. Data Concerning the Defendant

1. Name Morgan Alfonso / 2. Date of Birth 01 01 38
Last, First Middle Mo. Day Yes

3. Social Security Number None
4. Sex: M [X] F [ ] 5. Marital Status: Never Marr'd [X]
Married [ ]
Divorced [ ]
Spouse Deceased [ ]

6. Children
(a) Number of children None
(b) Ages of children: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
(Circle age of each child)
7. Father living: yes [X] no [ ] If deceased, give date of death _____
8. Mother living: yes [X] no [ ] If deceased, give date of death _____
9. Number of children born to parents Six (6)
10. Education--Highest Grade Completed: 1 2 3 4 5 6 7 8 9 10 (11) 12 13 14 15 16
(Circle one) [college
11. Intelligence Level: (IQ below 70) Low [ ]
(IQ 70 to 130) Medium [X]
(IQ above 130) High [ ]

12. Psychiatric Evaluation Performed? Yes [ ] No [X]
If performed on defendant:
a. Able to distinguish right from wrong? [ ] [ ]
b. Able to adhere to the right? [ ] [ ]
c. Able to cooperate intelligently in his own defense? [ ] [ ]
13. If examined, were character or behavior disorders found? Yes [ ] No [ ]
(If answer is yes please elaborate) _____

14. What other pertinent psychiatric [and psychological] information was reveal

None

15. Prior Work Record of Defendant:
Type Job Yrs Dates Held Reason for Termination

a. The subject states that he has been employed at various times as a brick

b. mason's assistant, a carpenter, and a convenient store clerk. He de-

c. clined to give any particular employers or dates of employment.

d. _____

e. _____

(1) Separate reports must be submitted for each defendant sentenced to death.

B. Data Concerning the Trial

1. Was the case tried with or without jury? With [x] Without [ ]

2. How did the defendant plead? Guilty [ ] Not guilty [x]

C. Offense Related Data

1. Capital Offense for Which Penalty Imposed:
   a. Treason.....[ ]
   b. Murder.....[x]
   c. Kidnapping for Ransom.....[ ]
   d. Kidnapping where Injury Results.....[ ]
   e. Aircraft Hijacking.....[ ]
   f. Rape.....[ ]
   g. Armed Robbery.....[x]

2. Were other offenses tried in the same trial? yes [ ] no [x]

   If other offenses were tried in the same trial list these offenses.

   a. _____
   b. _____
   c. _____
   d. _____

3. If tried with jury, did the jury recommend the death sentence?
   Yes [x] No [ ]

4. Statutory aggravating circumstances found: Yes [x] No [ ]

5. Which of the following statutory aggravating circumstances were instructed and which were found?

	Instructed	Found
a. (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or (2) The offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.	[ ]	[ ]
b. (1) The offense of murder, rape armed robbery or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery or (2) The offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.	[ ]	[ ]
c. The offender by his act of murder, armed robbery, or kidnapping knowingly creates a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	[ ]	[ ]

	Instructed	Found
d. The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.	[ ]	[ ]
e. The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.	[ ]	[ ]
f. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	[ ]	[ ]
g. The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.	[ ]	[x]
h. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	[ ]	[ ]
i. The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.	[ ]	[ ]
j. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.	[ ]	[ ]

6. List any statutory aggravating circumstances indicated by the evidence, if any.

a. _____

b. _____

c. _____

d. _____

7. Was there evidence of mitigating circumstances? Yes [ ] No [x]

8. If so, which of the following mitigating circumstances was in evidence?

a. The defendant has no significant history of prior criminal activity.	[ ]
b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.	[ ]
c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.	[ ]
d. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.	[ ]
e. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.	[ ]

f. The defendant acted under duress or under the domination of another person. [ ]

g. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. [ ]

h. The youth of the defendant at the time of the crime. [ ]

i. Other. [ ]
Please explain if (i) is checked _____

_____

_____

(0168)

9. If tried with a jury, was the jury instructed to consider the circumstances indicated in g as mitigating circumstances? Yes [ ] No [x]

10. Does the defendant's physical or mental condition call for special consideration? Yes [ ] No [x]

11. Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt? Yes [x] No [ ]

12. Was the victim related by blood or marriage to defendant? Yes [ ] No [x]
13. If answer is yes, what was the relationship? _____

_____

_____

14. Was the victim an employer or employee of defendant? No [x]
Employer [ ]
Employee [ ]

15. Was the victim acquainted with the defendant? No [x]
Casual Acquaintance [ ]
Friend [ ]

16. Was the victim local resident or transient in the community? Resident [x]
Transient [ ]

17. Was the victim the same race as defendant? Yes [ ] No [x]

18. Was the victim the same sex as the defendant? Yes [x] No [ ]

19. Was the victim held hostage during the crime? No [ ]
Yes - Less than an hour [ ]
Yes - More than an hour [x]

20. Was the victim's reputation in the community: Good [x]
Bad [ ]
Unknown [ ]

21. Was the victim physically harmed or tortured? Yes [x] No [ ]
If yes, state extent of harm or torture: Death

_____

_____

22. What was the age of the victim? _____

23. If a weapon was used in commission of the crime was it?

No weapon used	[ ]
Poison	[ ]
Motor Vehicle	[ ]
Blunt Instrument	[ ]
Sharp Instrument	[ ]
Firearm	[X]
Other _____	[ ]

01684

24. Does the defendant have a record of prior convictions? Yes [ ] No [XX]

25. If answer is yes, list the offenses, the dates of the offenses and the sentences imposed:

Offense	Date of Offense	Sentence Imposed
a.		
b.		
c.		
d.		

26. Was there evidence the defendant was under the influence of narcotics or dangerous drugs at the time of the offense? Yes [ ] No [XX]

27. Was the defendant a local resident or transient in the community?

Resident	[X]
Transient	[ ]

D. Representation of Defendant *

1. Date counsel secured August 30, 1977

2. How was counsel secured? a. Retained by defendant [ ]
b. Appointed by Court [XX]

3. If counsel was appointed by court was it because
a. Defendant unable to afford counsel? [X]
b. Defendant refused to secure counsel? [ ]
c. Other (explain) _____ [ ]

4. How many years has counsel practiced law? a. 0 to 1 [X]
b. 1 to 10 [ ]
c. over 10 [ ]

5. What is the nature of counsel's practice? a. Mostly civil [ ]
b. General [X]
c. Mostly criminal [ ]

6. Did the same counsel serve throughout the trial? Yes [XX] No [ ]

7. If not explain in detail: _____

(If more than one counsel served answer the above questions as to each counsel and attach to this report.)

01685

E. General Considerations

1. Was race raised by the defense as an issue in the trial? Yes [ ] No [x]

2. Did race otherwise appear as an issue in the trial? Yes [ ] No [x]

3. What percentage of the population of your county is the same race as the defendant?

   a. Under 10%.....[ ]
   b. 10 to 25%.....[ ]
   c. 25 to 50%.....[x]
   d. 50 to 75%.....[ ]
   e. 75 to 90%.....[ ]
   f. Over 90%.....[ ]

4. Were members of defendant's race represented on the jury? Yes [x] No [ ]

5. If not, was there any evidence they were systematically excluded from the jury? Yes [ ] No [x]

6. Was the jury instructed to exclude race as an issue? Yes [ ] No [x]

7. Was there extensive publicity in the community concerning this case? Yes [x] No [ ]

8. Was the jury instructed to disregard such publicity? Yes [ ] No [x]

9. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [x]

10. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [x]

11. If answer is yes, what was that evidence? ___

12. General comments of the Trial Judge concerning the appropriateness of the sentence imposed in this case This murder was inexcusable and the vile and horrible manner of death renders the sentence appropriate.

F. Chronology of Case

		Elapsed Days
1.	Date of Offense August 22, 1976	0
2.	Date of Arrest August 28, 1976	6
3.	Date Trial Began July 11, 1977	315
4.	Date Sentence Imposed July 14, 1977	318

6. Date Trial Judge's Report Completed 3/27/79

7. *Date Received by Supreme Court _____

8. *Date Sentence Review Completed _____

9. *Total Elapsed Days _____

* To be completed by Supreme Court

This report was submitted to the defendant's counsel for such comments as he desired to make concerning the factual accuracy of the report, and

1. His comments are attached ( )
2. He stated he had no comments (x)
3. He has not responded ( )

March 27 1979
Date

Edwin D. Hudgins Jr.
Judge, Superior Court of
Richmond County

No. 7244 - Motion Docket

Trial Judge Lyman (Salida)
3/31/78

STATE OF GEORGIA
VS
ALFONZO MORGAN

STATE OF GEORGIA : CLERK'S OFFICE
RICHMOND COUNTY : SUPERIOR COURT

01687

I, Helen M. Spaltz, Clerk of the Superior Court of Richmond County, Georgia, hereby certify that the foregoing Trial Judge's Report is the original taken from the files of this office, in the above stated case.

Witness my signature and the seal of said Court hereto affixed at Augusta, Georgia, this 31st day of March, 19 78.

Helen M. Spaltz
Clerk

SUPERIOR COURT
RICHMOND COUNTY

FILED IN OFFICE

DEPUTY CLERK OF SUPREME COURT OF GEORGIA

February 15, 1978

Mr. Alfonso Morgan
Richmond County Correctional Institute
Post Office Box 5259
Augusta, Georgia 30906

Dear Mr. Morgan:

We have received your letter dated February 13, 1978. You indicated that you have an attorney assigned to your case. We are unable to become involved in a case where an attorney is presently active and representing his client on appeal, so we will not be able to directly help you at this time. I would suggest you try contacting your attorney again for additional assistance.

If in the future we can be of help to you, please do not hesitate to write.

Sincerely,

/s/ BARRY SIKES

Barry G. Sikes
Legal Assistant

BGS/dgl

April 18, 1978

Alphonso Morgan
R. C. C. I.
P. O. Box 5259
Augusta, Georgia 30906

Dear Sir:

I have your letter of April 13. Your case is presently before the Supreme Court of Georgia and the appeal will be prosecuted by Mr. Nicholson. There is no reason for other or additional counsel.

Yours very truly,

/s/ EDWIN D. FULCHER
Edwin D. Fulcher

edf/d

Copies to Mr. Richard E. Allen, District Attorney
Mr. Chris G. Nicholson, Attorney

IN THE
SUPERIOR COURT
OF RICHMOND COUNTY, GEORGIA

ALFONSO MORGAN *Petitioner* VS. CLERK OF COURT *Respondent*	Motion Docket No. 7641

ORDER

The Petitioner, Alfonso Morgan, having filed a "PETITION FOR COPY OF RECORDS", and it appearing to the Court that:

Alfonso Morgan was found guilty of the offenses of Murder, Armed Robbery and Kidnapping and on the 14th day of July, 1977, was sentenced to death on the Murder conviction and life on the Armed Robbery conviction and twenty years on the Kidnapping conviction, to be served consecutively; and,

It further appearing to the Court that no justification or necessity for transmittal of the requested documents is alleged or shown as they are in the possession of Defendant's (Petitioner's) attorney, the Petitioner's Motion is hereby denied.

This 21st day of April, 1978.

/s/ EDWIN D. FULCHER
J.S.C.A.C.

Presented By:

RICHARD E. ALLEN
District Attorney
RICHARD E. ALLEN

February 21, 1979

Morgan v. Georgia
No. 78-6140 (A-697)

DEAR MR. RODAK:

I am now appearing as counsel, pro bono publico, for Alphonso Morgan, who is imprisoned in Georgia under sentence of death.

On January 30, 1979, it came to the attention of Mr. Millard Farmer, of Team Defense Project, Inc., that Mr. Morgan was scheduled to be executed on February 7, 1979. Mr. Farmer also discovered that counsel who had been appointed to represent Mr. Morgan at his trial and appeal in Georgia (i) had not filed a certiorari petition, and (ii) had not communicated with his client since the decision by the Supreme Court of Georgia affirming petitioner's conviction and sentence of death.

Mr. Farmer was informed by Mr. Lorson of your office that he could not apply for a stay of execution without first filing a Petition for Certiorari. Accordingly, without benefit of the full record, or an opportunity to adequately research the issues, Mr. Farmer filed a pro forma Petition on February 2, 1979, indicating that it was to be followed by a petition which would adequately present the important issues for the Court's review.

On February 2, 1979, Mr. Justice Powell signed an Order staying the execution of sentence.

Since my agreement to be substituted as counsel for petitioner in all further proceedings in this Court, I have attempted to assemble the complete record. While at the

end of last week, I had obtained enough of the record to be able to commence the research, I still do not have all the relevant papers. As of this date I still have not received necessary papers from appointed Georgia counsel, and still do not have the relevant court records in the cases involving Morgan's alleged codefendants.

Considering the seriousness of the matter, my associate, Francis P. Barron, last week telephoned John W. Dunsmore, Jr., the Assistant Attorney General of the State of Georgia responsible for representing the State in this matter, to discuss his position on the timing for the submission of our Petition for Certiorari, *i.e.*, the replacement for the petition hastily submitted, without benefit of record or research. Mr. Dunsmore said that he had no objection to our taking the time that is necessary in light of the serious nature of the case, that he wanted to be certain that the entire matter was adequately briefed, and that his only concern was that the State would have its usual 30 days to respond after the submission of our Petition.

Having now just had an opportunity to focus on the relevant material and to begin the necessary legal research, it seems to me that a reasonable target for filing the Petition would be April 23, *i.e.*, 60 days from the date of this letter. Mr. Barron spoke to Mr. Dunsmore by telephone today and he indicated that he would prefer that I limit myself to 30 days. However, in light of the seriousness of the matter, the unavailability of the record until now (and the need to obtain still other necessary documents), I represent that such a short time to prepare might result in an injustice.

I would appreciate it if you would advise me whether the proposed April 23 date is satisfactory. I recognize, of course, that nothing was filed by Mr. Morgan within the time required by the rules. However, considering Georgia

counsel's abandonment of petitioner, and, in particular, considering that the case involves a death sentence, I believe that the arrangement which I have suggested is necessary in the interest of justice.

Sincerely yours,

/s/ FREDERICK A. O. SCHWARZ, JR.
Frederick A. O. Schwarz, Jr.

HON. MICHAEL RODAK,
Office of the Clerk,
Supreme Court of the United States,
Washington, D.C. 20543

Attention of Hon. Francis J. Lorson

BY HAND

3N

Copy to John W. Dunsmore, Jr., Esq.,
132 State Judicial Building,
40 Capital Square, S.W.,
Atlanta, Georgia 30334.
EXPRESS MAIL

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 26, 1979

Frederick A. O. Schwarz, Jr., Esquire
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, New York 10005

Re: *Alphonso Morgan* v. *Georgia*
No. 78-6140

Dear Mr. Schwarz:

Your request of February 21, 1979 for an extension of time in which to file a supplement to the petition has been granted, and the time to file such a supplement has been extended to and including only March 24, 1979. No further extension of time will be entertained.

The time for the Attorney General to respond to the petition and the supplement thereto has been extended to and including April 23, 1979.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By /s/ FRANCIS J. LORSON
Francis J. Lorson
Deputy Clerk

th

cc: Millard C. Farmer, Jr., Esquire
Suite 831, 15 Peachtree Street, N.E.
Atlanta, Georgia 30303

John W. Dunsmore, Jr., Esquire
132 State Judicial Building
40 Capital Square, S.W.
Atlanta, Georgia 30334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-6140

(A-697)

ALPHONSO MORGAN,

Petitioner,

v.

GEORGIA,

Respondent.

AFFIDAVIT OF ALPHONSO MORGAN REGARDING TIMELINESS OF HIS PETITION

STATE OF GEORGIA,
COUNTY OF TATNELL, } ss.:

ALPHONSO MORGAN, being duly sworn, deposes and says:

1. I am a citizen of the United States and the petitioner in this case.

2. My petition for certiorari is not on time because the lawyer appointed by the trial court to take my case abandoned me after my conviction and sentence had been

affirmed by the Supreme Court of Georgia on June 28, 1978. He did not tell me what I could do to help myself or how I could get legal help. He just said he was off my case. I have no money and I am not well educated. I did not understand how to appeal my case. In addition, it was hard for me to get information about my case or to get help because I have been in prison since August 28, 1976, the day on which I was arrested.

3. I tried to get legal help, but was unsuccessful. I sent letters to lawyers, but they said they could not help me because I already had a lawyer. Without a lawyer, I tried to help myself by sending a handwritten form to the Federal court in Georgia in August of 1978. I never heard anything about that until just recently, when I was told that I had gone to the wrong court.

4. Then, sometime at the end of last January, I got a paper from the State that said I would be killed on February 7, 1979. Someone at the prison told me to send the paper to Millard Farmer, and I did. Mr. Farmer wrote back to me saying he would try to get the execution put off and help me to get a lawyer so that I could ask this Court to review my case. That was the first time any lawyer said he would help me ask this Court to look at my case.

5. The lawyer appointed by the trial court to represent me never showed interest in my case. He talked to me only a few times before the trial and while it was going on. He did not want to represent me any further after I was convicted on July 14, 1977. I asked him to appeal, but he said someone else would do it. I asked him to get me a transcript of the trial. He said he would, but never did.

6. On July 22, 1977, without a lawyer, I sent a handwritten notice to the Superior Court in Richmond County, saying that I was going to appeal and asking the Court to appoint a lawyer for me.

7. On August 10, 1977, again without a lawyer, I wrote out and sent a petition for a copy of the record in my case so that I could appeal. Judge Fulcher, who was the Judge at my trial, sent my petition to Richard Allen, the District Attorney. (Judge Fulcher sent me a copy of his letter to Mr. Allen. He did not send a copy to the lawyer who had represented me at trial.) I did not hear anything, so I wrote a letter to the Clerk of the Superior Court in Richmond on October 5, 1977, asking for a copy of the record. I told her that my lawyer had not talked to me since the trial and that I needed the papers so that I could help myself.

9. On December 19, 1977, I wrote a letter to the Clerk of the Supreme Court of Georgia telling her that I had tried to get the transcript from my lawyer and that I had heard nothing about my case. The Clerk told me that she had received my letter and told me that my lawyer's brief would be studied carefully by the Supreme Court of Georgia. Much later, I found out that my lawyer had not even filed a brief and that he had to be asked by the State to file one.

10. On April 21, 1978, over eight months after the date that I asked for a copy of the record in my case, Judge Fulcher said he would not give them to me because my lawyer already had the papers.

/s/ ALPHONSO MORGAN
Petitioner

Sworn to and subscribed before me this 18th day of March 1979.
/s/ MILLARD C. FARMER, JR.
N.P. STATE AT LARGE

Supreme Court of the United States

No. A-697 (78-6140)

ALPHONSO MORGAN,

Petitioner,

v.

GEORGIA

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the execution and enforcement of the sentence of death imposed upon the petitioner is hereby stayed pending the disposition by this Court of a petition for a writ of certiorari filed February 2, 1979. Should the petition for a writ of certiorari be denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to continue pending the issuance of the mandate of this Court.

LEWIS F. POWELL, JR.

Associate Justice of the Supreme Court of the United States

A true copy MICHAEL RODAK, JR.
Clerk of the Supreme Court of the United States

By /s/ FRANCIS J. LORSON
Deputy

Dated this 2nd day of February, 1979.

TABLE OF CASES IN WHICH THE GEORGIA SUPREME COURT HAS CONSIDERED THE SUFFICIENCY OF EVIDENCE IN THE RECORD TO SUPPORT A FINDING OF THE § (b)(7) AGGRAVATING CIRCUMSTANCE

In each of the following cases--comprising every case decided since Godfrey--the Georgia Supreme Court has found the evidence sufficient to sustain a jury finding of a § (b)(7) aggravating circumstance.* In none of these cases has the state supreme court given the trial courts any guidance concerning how to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the Process for imposing a sentence of death.'" 446 U.S. at 428.

1. Cervi v. State, No. 37316 (Ga. Sup. Ct. Sept. 29, 1981).
2. Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981).
3. Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981).
4. Justus v. State, 247 Ga. 276, 276 S.E.2d 242, cert. denied, No. 80-6844 (Oct. 5, 1981).
5. Thomas v. State, 247 Ga. 233, 275 S.E.2d 318 (1981).
6. Hardy v. State, 247 Ga. 235, 275 S.E.2d 319 (1981).
7. Messer v. State, 247 Ga. 316, 276 S.E.2d 15 (1981).
8. Brown v. State, 247 Ga. 298, 275 S.E.2d 52, cert. denied, No. 80-6839 (Oct. 5, 1981).
9. High v. State, 247 Ga. 289, 276 S.E.2d 5 (1981).
10. Tyler v. State, 247 Ga. 119, 274 S.E.2d 549 (1981).
11. Strickland v. State, 247 Ga. 219, 275 S.E.2d 29, cert. denied, No. 80-6786 (Oct. 5, 1981).
12. Nelson v. State, 247 Ga. 172, 274 S.E.2d 317 (1981).

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* In Patrick v. State, 247 Ga. 168, 274 S.E.2d 570 (1981), the Georgia Supreme Court reversed the § (b)(7) finding on other grounds, but expressly noted the presence in the record of sufficient evidence to support such a finding.

13. Solomon v. State, 247 Ga. 27, 277 S.E.2d 1 (1980), cert. denied, 101 S.Ct. 2348 (1981).

14. Cape v. State, 246 Ga. 520, 272 S.E.2d 487 (1980), cert. denied, 101 S.Ct. 956 (1981).

15. Green v. State, 246 Ga. 598, 272 S.E.2d 475 (1980), cert. denied, 101 S.Ct. 1402 (1981).

16. Hill v. State, 246 Ga. 402, 271 S.E.2d 802 (1980), cert. denied, 101 S.Ct. 2001 (1981).

17. Davis v. State and Spraggins v. State, 246 Ga. 432, 271 S.E.2d 828 (198), cert. denied, 101 S.Ct. 2000 (1981).

18. Baker v. State, 246 Ga. 259, 272 S.E.2d 61 (1980), cert. denied, 101 S.Ct. 1402 (1981).

19. Collins v. State, 246 Ga. 261, 271 S.E.2d 352 (1980), cert. denied, 101 S.Ct. 900 (1981).

20. Brooks v. State, 246 Ga. 262, 271 S.E.2d 172 (1980), cert. denied sub nom., Davis v. Georgia, 101 S.Ct. 2000 (1981).

21. Hamilton v. State, 246 Ga. 264, 271 S.E.2d 173 (1980), cert. denied, 101 S.Ct. 900 (1981).

22. Dampier v. State, 245 Ga. 427, 265 S.E.2d 565, addendum, 245 Ga. 882, 268 S.E.2d 349, cert. denied, 449 U.S. 938 (1980).

SUMMARY OF CAPITAL CASES AVAILABLE TO THE SUPREME COURT OF GEORGIA FOR COMPARISON PURPOSES AT THE END OF 1977, IN WHICH (1) LIFE SENTENCES WERE IMPOSED AND (2) THE COURT'S ASSISTANT REPORTED MITIGATING CIRCUMSTANCES*

Table 1

Cases in which Youth was Reported as a Mitigating Circumstance

Sanders v. State, 235 Ga. 425, 219 S.E.2d 768 (1975)**

Tarpkin [Johnny] v. State, 236 Ga. 67, 222 S.E.2d 364 (1976)**

Tarpkin [Robert] v. State, 236 Ga. 67, 222 S.E.2d 364 (1976)**

Fuller v. State, 231 Ga. 818, 204 S.E.2d 592 (1974)**

Sims v. State, 229 Ga. 33, 189 S.E.2d 68 (1972)**

Stovall v. State, 236 Ga. 840, 225 S.E.2d 292 (1976)

Riley v. State, 237 Ga. 124, 226 S.E.2d 922 (1976)

Gibson v. State, 236 Ga. 175, 223 S.E.2d 150 (1976)

Davis v. State, 233 Ga. 638, 212 S.E.2d 814 (1975)

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* Counsel for Petitioner have examined the trial judge's questionnaires in the cases summarized in this Appendix. The questionnaires are on file in the Supreme Court of Georgia under the custody of the Assistant to the Georgia Supreme Court (*see* Ga. Code Ann. §27-2537 (f)-(h)). If the Court desires, Counsel for Petitioner will supply the Court with copies of the questionnaires.

** Jury instructed that it could find one or more of the statutory aggravating circumstances charged in petitioner's case.

Table 2

Cases in which the Lack of a Prior Criminal Record was Reported as a Mitigating Circumstance

Sanders v. State, 235 Ga. 425, 219 S.E.2d 768 (1975)**

Burke v. State, 234 Ga. 512, 216 S.E.2d 812 (1975)**

English v. State, 234 Ga. 602, 216 S.E.2d 851 (1975)**

Stovall v. State, 236 Ga. 840, 225 S.E.2d 292 (1976)

Jackson v. State, 234 Ga. 602, 216 S.E.2d 851 (1975)

Henderson v. State, 234 Ga. 893, 218 S.E.2d 622 (1975)

Cooper v. State, 229 Ga. 277, 191 S.E.2d 27 (1972)

Coffee v. State, 230 Ga. 123, 195 S.E.2d 897 (1973)

Brown v. State, 228 S.E.2d 215, 184 S.E.2d 655 (1971)

Chandle v. State, 230 Ga. 574, 198 S.E.2d 289 (1973)

Reese v. State, 231 Ga. 799, 204 S.E.2d 152 (1974)

Spencer v. State, 231 Ga. 705, 203 S.E.2d 856 (1974)

Gaines v. State, 232 Ga. 727, 208 S.E.2d 798 (1974)

Johnson v. State, 231 Ga. 138, 200 S.E.2d 734 (1973)

Butler v. State, 231 Ga. 276, 201 S.E.2d 448 (1973)

McClendon v. State, 231 Ga. 67, 199 S.E.2d 904 (1973)

Allen v. State, 230 Ga. 772, 199 S.E.2d 246 (1973)

York v. State, 226 Ga. 281, 174 S.E.2d 418 (1970)

Griffin v. State, 237 Ga. 532, 228 S.E.2d 908 (1976)

Banks v. State, 227 Ga. 578, 182 S.E.2d 106 (1971)

Page v. State, 237 Ga. 20, 227 S.E.2d 8 (1976)

** Jury instructed that it could find one or more of the statutory aggravating circumstances charged in petitioner's case.

Rini v. State, 236 Ga. 715, 225 S.E.2d 234 (1976)

Herlong v. State, 236 Ga. 326, 223 S.E.2d 672 (1976)

Glass v. State, 235 Ga. 17, 218 S.E.2d 776 (1975)

Lavender v. State, 234 Ga. 608, 216 S.E.2d 855 (1975)

Shy v. State, 234 Ga. 816, 218 S.E.2d 599 (1975)

Jones v. State, 234 Ga. 108, 214 S.E.2d 544 (1975)

Table 3

Cases in which the jury was instructed that it could find one or more of the statutory aggravating circumstances charged in petitioner's case, and where there were mitigating factors reported (other than youth or lack of a prior criminal record)

Brooks v. State, 233 Ga. 524, 212 S.E.2d 355 (1975)

Scott v. State, 230 Ga. 413, 197 S.E.2d 338 (1973)

Jackson v. State, 234 Ga. 153, 210 S.E.2d 673 (1975)

Owens v. State, 233 Ga. 905, 213 S.E.2d 860 (1975)

Gaither v. State, 234 Ga. 465, 216 S.E.2d 324 (1975)

Stamper v. State, 235 Ga. 165, 219 S.E.2d 140 (1975)

Table 4

Cases Where Mitigating Factors Other Than Youth Or Lack of Prior Record Were Reported

Stewart v. State, 234 Ga. 3, 214 S.E.2d 509 (1975)

Wood v. State, 234 Ga. 623, 216 S.E.2d 865 (1975)

Graham v. State, 234 Ga. 520, 216 S.E.2d 817 (1975)

Battle v. State, 234 Ga. 637, 217 S.E.2d 255 (1975)

Lindsey v. State, 234 Ga. 874, 218 S.E.2d 585 (1975)

Henderson v. State, 234 Ga. 827, 218 S.E.2d 612 (1975)

Jones v. State, 234 Ga. 648, 217 S.E.2d 597 (1975)

Harrison v. State, 236 Ga. 355, 223 S.E.2d 715 (1976)

Wessner v. State, 236 Ga. 162, 223 S.E.2d 141 (1976)

Graham v. State, 236 Ga. 378, 223 S.E.2d 803 (1976)

Brannen v. State, 235 Ga. 505, 220 S.E.2d 264 (1975)

Williams v. State, 232 Ga. 203, 206 S.E.2d 37 (1974)

Young v. State, 232 Ga. 285, 206 S.E.2d 439 (1974)

Coats v. State, 234 Ga. 659, 217 S.E.2d 260 (1975)

Teasley v. State, 228 Ga. 107, 184 S.E.2d 179 (1971)

DEATH CASES IN WHICH THE GEORGIA SUPREME COURT HAS CONSIDERED THE ADEQUACY OF JURY INSTRUCTIONS

Explanation of Summary Chart

The following chart summarizes the characteristics of the jury charged in 72 cases (including petitioner's) in which the Georgia Supreme Court has explicity dealt with the adequacy of jury instructions.* The cases are set forth in the order in which they were decided.

For each case, the chart indicates in the first column whether or not the Georgia Supreme Court approved the trial court's charge. In columns 2-5, the chart indicates, for each case, whether or not the charge included the following distinct characteristics necessary to make a death penalty charge under the Georgia statute, and this Court's decisions, accurate and clear:

2. An instruction that the jury was authorized to consider mitigating circumstances.

3. A definition of the legal term "mitigation".

4. Particular mitigating circumstances which the jury could consider.

5. An instruction that, even if it found statutory aggravating circumstances, the jury could nevertheless return a sentence of life imprisonment.

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* The jury charges are part of the records of the Supreme Court of Georgia. Counsel for petitioner has examined the instructions, and will, if the Court desires, make copies available for its use.

DEATH CASES IN WHICH THE GEORGIA SUPREME COURT HAS CONSIDERED THE ADEQUACY OF JURY INSTRUCTIONS

Case*	Charge Approved by Georgia Supreme Court	Instructed to Consider Mitigating Circumstances	Definition of the Term "Mitigation"	Particular Mitigating Circumstances Suggested	Authorized to Return Life Sentencing Even If Aggravating Circumstances Found
1. Street	Yes	Yes	Yes	No	No
2. Harris	Yes	No	No	No	No
3. Fleming	No	Yes	No	No	No
4. Hawes	No	No	No	No	Yes (1)
5. Thomas	Yes	Yes	Yes	No	Yes
6. Spraggins	No	No	No	No	No
7. Redd (2)	No	No	No	No	No (3)

* A list of citations by line number appears at A. .

(1) At first, the court did not so charge, but colloquoy between the court and defense counsel in the presence of jury made this clear.

(2) Judge Fulcher gave precisely the same instruction in petitioner's case as he gave in Redd, except: (i) the state did not seek the death penalty for kidnapping in petitioner's case, so he did not charge on that offense; (ii) in petitioner's case, he defined "aggravated battery"; and (iii) in petitioner's case, he added to his general instruction that the jury should consider all the facts and circumstances, the phrase: "including any mitigating or aggravating circumstances".

(3) Defense counsel specifically requested such a charge. Judge Fulcher noted the objection, but did not recharge.

DEATH CASES IN WHICH THE GEORGIA SUPREME COURT HAS CONSIDERED THE ADEQUACY OF JURY INSTRUCTIONS

Case	Charge Approved by Georgia Supreme Court	Instructed to Consider Mitigating Circumstances	Definition of the Term "Mitigation"	Particular Mitigating Circumstances Suggested	Authorized to Return Life Sentencing Even If Aggravating Circumstances Found
8. F. Davis	No	No	No	No	No
9. Lamb	No	Yes (4)	No	No	No
10. Presnell	Yes	Yes	Yes	No	Yes
11. Potts (5)	Yes	No	Yes	No	Yes
12. Potts (5)	Yes	Yes	Yes	No	Yes
13. Spivey	Yes	No	No	No	No
14. C. Davis (retrial)	Yes	Yes	Yes	No	Yes
15. MORGAN	Yes	No (6)	No	No	No
16. Bowen	No	Yes	No	No	No
17. Alderman	Yes	Yes	Yes	No	Yes

(4) The jury was instructed that it could consider the evidence adduced by defendant during the sentencing phase of the trial.

(5) Defendant was tried and sentenced on separate charges by two separate courts. Thus, there were two charges reviewed by the Supreme Court of Georgia.

(6) Near the beginning of his charge, Judge Fulcher said that the jury should "consider all the facts and circumstances of the case, including any mitigating or aggravating circumstances" (A.70).

DEATH CASES IN WHICH THE GEORGIA SUPREME COURT HAS CONSIDERED THE ADEQUACY OF JURY INSTRUCTIONS

Case	Charge Approved by Georgia Supreme Court	Instructed to Consider Mitigating Circumstances	Definition of the Term "Mitigation"	Particular Mitigating Circumstances Suggested	Authorized to Return Life Sentencing Even If Aggravating Circumstances Found
18. Stephens (habeas)	Yes	Yes	No	No	Yes (7)
19. Burger	No	No	No	No	No
20. T. Stevens	No	No	No	No	No
21. Westbrook	Yes	Yes	No	No (8)	Yes (9)
22. Berryhill (habeas)	Yes	No	No	No	No
23. Young (habeas)	Yes	Yes	Yes	No	Yes
24. Banks	Yes	Yes	Yes	Yes (10)	No
25. Johnson	Yes	Yes	Yes	No	Yes
26. Finney	Yes	Yes	Yes	Yes	Yes (9)

A.142

(7) Though it was not made explicit.

(8) But court calls jury's attention to evidence brought out by defendant during presentencing hearing.

(9) But there is some confusion in the charge.

(10) The defendant's youth (he was 23 at the time of the offense).

DEATH CASES IN WHICH THE GEORGIA SUPREME COURT HAS CONSIDERED THE ADEQUACY OF JURY INSTRUCTIONS

Case	Charge Approved by Georgia Supreme Court	Instructed to Consider Mitigating Circumstances	Definition of the Term "Mitigation"	Particular Mitigating Circumstances Suggested	Authorized to Return Life Sentencing Even If Aggravating Circumstances Found
27. Redd (retrial)	Yes (11)	Yes	Yes	No	Yes
28. Ruffin	Yes	No	No	No	No
29. F. Davis (retrial)	Yes	Yes	Yes	No	Yes
30. Fleming (retrial)	Yes	Yes	Yes	No	Yes
31. Goodwin (habeas)	Yes	No	No	No	No
32. Willis	Yes	Yes	Yes	No	Yes
33. Harris (habeas)	No	No	No	No	No
34. Godfrey	Yes	Yes	Yes	No	Yes
35. Collins	Yes	Yes	Yes	Yes	Yes
36. Holton	No (12)	No	No	No	No

(11) After being reversed (case number 7 supra), Judge Fulcher--the judge who charged the jury in petitioner's case--gave the jury far better guidance.

(12) Both the prosecutor and the trial court conceded that the charge was inadequate, and the state supreme court agreed.

DEATH CASES IN WHICH THE GEORGIA SUPREME COURT HAS CONSIDERED THE ADEQUACY OF JURY INSTRUCTIONS

Case	Charge Approved by Georgia Supreme Court	Instructed to Consider Mitigating Circumstances	Definition of the Term "Mitigation"	Particular Mitigating Circumstances Suggested	Authorized to Return Life Sentencing Even If Aggravating Circumstances Found
37. Amadeo	Yes	Yes	No	No	Yes
38. Baker	Yes	Yes	No	No	Yes
39. Legare	Yes	Yes	No	No	Yes
40. Jones	Yes	Yes	No	No	Yes
41. Hamilton	Yes	Yes	Yes	No	Yes
42. Bowden (habeas)	Yes	Yes	Yes	Yes	No
43. Bowen (retrial)	Yes	Yes	Yes	Yes	Yes
44. Gates	Yes	Yes	Yes	No	Yes
45. Brooks	Yes	Yes	Yes	No	Yes

DEATH CASES IN WHICH THE GEORGIA SUPREME COURT HAS CONSIDERED THE ADEQUACY OF JURY INSTRUCTIONS

Case	Charge Approved by Georgia Supreme Court	Instructed to Consider Mitigating Circumstances	Definition of the Term "Mitigation"	Particular Mitigating Circumstances Suggested	Authorized to Return Life Sentencing Even If Aggravating Circumstances Found
46. W. Tucker	Yes	Yes	Yes	No	Yes
47. Franklin	Yes	Yes	Yes	Yes	Yes
48. R. Tucker	Yes	Yes	Yes	No	Yes
49. McCleskey	Yes	Yes	Yes	No	Yes
50. Patrick	Yes	Yes	Yes	No	Yes
51. Ha ly	Yes	Yes	Yes	No	Yes
52. Mulligan	Yes	Yes	Yes	No	No
53. Dampier	Yes	No	No	No	No
54. Burger (retrial)	Yes	Yes	Yes	No	Yes

DEATH CASES IN WHICH THE GEORGIA SUPREME COURT HAS CONSIDERED THE ADEQUACY OF JURY INSTRUCTIONS

Case	Charge Approved by Georgia Supreme Court	Instructed to Consider Mitigating Circumstances	Definition of the Term "Mitigation"	Particular Mitigating Circumstances Suggested	Authorized to Return Life Sentencing Even If Aggravating Circumstances Found
55. T. Stevens (retrial)	Yes	Yes	Yes	No	Yes
56. Hance	Yes	Yes	Yes	No	Yes
57. Spraggins (retrial)	Yes	Yes	Yes	No	Yes
58. T. Hill	Yes	Yes	No	No	Yes
59. Green	Yes	Yes	No	Yes	Yes
60. Cape	Yes	Yes	Yes	No	Yes
61. Dick	Yes	Yes	Yes	No	Yes
62. Solomon	Yes	Yes	Yes	No	Yes
63. Nelson	Yes	Yes	Yes	No	Yes

DEATH CASES IN WHICH THE GEORGIA SUPREME COURT HAS CONSIDERED THE ADEQUACY OF JURY INSTRUCTIONS

Case	Charge Approved by Georgia Supreme Court	Instructed to Consider Mitigating Circumstances	Definition of the Term "Mitigation"	Particular Mitigating Circumstances Suggested	Authorized to Return Life Sentencing Even If Aggravating Circumstances Found
64. Tyler	Yes	Yes	No	No	Yes
65. N. Brown	Yes	Yes	Yes	No	Yes
66. D. Thomas	Yes	No	No	No	Yes
67. Messer	Yes	Yes	Yes	No	Yes
68. W. Stephens	Yes	Yes	Yes	No	Yes
69. Gaddis (habeas)	No (13)	No	No	No	No
70. Cervi	Yes	Yes	No	No	Yes
71. Wallace	Yes	Yes	Yes	Yes	Yes

(13) Following Spivey, the state supreme court held that a charge that directed the jury to consider "all the facts and circumstances" was sufficient to apprise the jury that it should consider mitigating circumstances. The court found the charge inadequate because it did not make clear that the jury could "recommend" life imprisonment even if it found a statutory aggravating circumstance.

CITATIONS FOR DEATH CASES IN WHICH THE GEORGIA SUPREME COURT HAS CONSIDERED THE ADEQUACY OF JURY INSTRUCTIONS

No. on Table	Case
1.	Street v. State, 237 Ga. 84, 226 S.E.2d 911 (1976).
2.	Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976).
3.	Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977).
4.	Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977).
5.	Thomas v. State, 240 Ga. 393, 242 S.E.2d 1 (1977), cert. denied, 436 U.S. 914 (1978).
6.	Spraggins v. State, 240 Ga. 759, 243 S.E.2d 20 (1978).
7.	Redd v. State, 240 Ga. 753, 243 S.E.2d 16 (1978).
8.	Davis v. State, 240 Ga. 763, 243 S.E.2d 12 (1978).
9.	Lamb v. State, 241 Ga. 10, 243 S.E.2d 59 (1978).
10.	Presnell v. State, 241 Ga. 49, 243 S.E.2d 496, rev'd in part, 439 U.S. 14 (1978).
11.	Potts v. State (first trial), 241 Ga. 67, 243, S.E.2d 510 (1978).
12.	Potts v. State (2nd trial), 241 Ga. 67, 243 S.E.2d 510 (1978).
13.	Spivey v. State, 241 Ga. 477, 246 S.E.2d 228, cert. denied, 439 U.S. 1039 (1978).
14.	Davis v. State, 241 Ga. 376, 247 S.E.2d 45, cert. denied, 439 U.S. 947 (1978).
15.	Morgan v. State, 241 Ga. 485, 246 S.E.2d 198 (1978), cert. denied, 441 U.S. 967 (1979).
16.	Bowen v. State, 241 Ga. 492, 246 S.E.2d 322 (1978).
17.	Alderman v. State, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991 (1978).
18.	Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991 (1978).
19.	Burger v. State, 242 Ga. 28, 247 S.E.2d 834 (1978).
20.	Stevens v. State, 242 Ga. 34, 247 S.E.2d 838 (1978).
21.	Westbrook v. State, 242 Ga. 151, 249 S.E.2d 524, cert. denied, 439 U.S. 1102 (1978).

No. on Table	Case
22.	Berryhill v. Ricketts, 242 Ga. 447, 249 S.E.2d 197 (1978), cert. denied, 441 U.S. 967 (1979).
23.	Young v. Ricketts, 242 Ga. 559, 250 S.E.2d 404 (1978), cert. denied, 442 U.S. 934 (1979).
24.	Banks v. Glass, 242 Ga. 518, 250 S.E.2d 431 (1978), cert. denied, 440 U.S. 986 (1979).
25.	Johnson v. State, 242 Ga. 649 (1978).
26.	Finney v. State, 242 Ga. 582, 250 S.E.2d 388 (1978), cert. denied, 441 U.S. 916 (1979).
27.	Redd v. State, 242 Ga. 876, 252 S.E.2d 382, cert. denied, 442 U.S. 934 (1979).
28.	Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472, cert. denied, 444 U.S. 995 (1979).
29.	Davis v. State, 242 Ga. 901, 252 S.E.2d 443, vacated and remanded, 446 U.S. 961, reaffirmed, 246 Ga. 432, 271 S.E.2d 828 (1980), cert. denied, U.S. , 101 S. Ct. 2000 (1981).
30.	Fleming v. State, 243 Ga. 120, 252 S.E.2d 609, cert. denied, 444 U.S. 885 (1979).
31.	Goodwin v. Hopper, 240 Ga. 605, 242 S.E.2d 119 (1978), cert. denied, 442 U.S. 947 (1979).
32.	Willis v. State, 243 Ga. 185, 253 S.E.2d 70, cert. denied, 444 U.S. 985 (1979).
33.	Harris v. Hopper, 243 Ga. 244, 253 S.E.2d 707 (1979).
34.	Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979), rev'd in part, 446 U.S. 420 (1980).
35.	Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979), vacated and remanded, 446 U.S. 961, reaffirmed, 246 Ga. 261, 271 S.E.2d 352 (1980), cert. denied, U.S. , 101 S. Ct. 900 (1981).
36.	Holton v. State, 243 Ga. 312, 253 S.E.2d 736, cert. denied, 444 U.S. 925 (1979).
37.	Amadeo v. State, 243 Ga. 627, 255 S.E.2d 718, cert. denied, 444 U.S. 974 (1979).
38.	Baker v. State, 243 Ga. 710, 257 S.E.2d 192 (1979), vacated and remanded, 446 U.S. 961, reaffirmed, 246 Ga. 259, 272 S.E.2d 61 (1980), cert. denied, U.S. , 100 S. Ct. 1402 (1981).

No. on Table	Case
39.	Legare v. State, 243 Ga. 744, 257 S.E.2d 247, cert. denied, 444 U.S. 984 (1979).
40.	Jones v. State, 243 Ga. 820, 256 S.E.2d 907, cert. denied, 444 U.S. 957 (1979).
41.	Hamilton v. State, 244 Ga. 145, 259 S.E.2d 81 (1979), vacated and remanded, 446 U.S. 961, reaffirmed, 246 Ga. 264, 271 S.E.2d 173 (1980), cert. denied, U.S. , 101 S. Ct. 900 (1981).
42.	Bowden v. Zant, 244 Ga. 260, 260 S.E.2d 465 (1979).
43.	Bowen v. State, 244 Ga. 495, 260 S.E.2d 855 (1979), cert. denied, 446 U.S. 970 (1980).
44.	Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938 (1980).
45.	Brooks v. State, 244 Ga. 574, 261 S.E.2d 379 (1979), vacated and remanded, 446 U.S. 961, reaffirmed, 246 Ga. 262, 271 S.E.2d 172 (1980), cert. denied sub nom., Davies v. Georgia, U.S. , 101 S. Ct. 2000 (1981).
46.	Tucker v. State, 244 Ga. 721, 261 S.E.2d 635 (1979), cert. denied, 445 U.S. 972 (1980).
47.	Franklin v. State, 245 Ga. 141, 263 S.E.2d 666, cert. denied, 447 U.S. 930 (1980).
48.	Tucker v. State, 245 Ga. 68, 263 S.E.2d 109 (1980).
49.	McCleskey v. State, 245 Ga. 198, 263 S.E.2d 146 (1980).
50.	Patrick v. State, 245 Ga. 417, 265 S.E.2d 553 (1980), vacated and remanded, U.S. , 101 S. Ct. 522, rev'd in part, 246 Ga. 168, 274 S.E.2d 570 (1981).
51.	Hardy v. State, 245 Ga. 272, 261 S.E.2d 209 (1980), vacated and remanded, U.S. , 101 S. Ct. 523, reaffirmed, 275 S.E.2d 319 (1981).
52.	Mulligan v. State, 245 Ga. 266, 264 S.E.2d 204, reaffirmed, 245 Ga. 881, 268 S.E.2d 351 (1980).
53.	Dampier v. State, 245 Ga. 427, 265 S.E.2d 565, reaffirmed, 245 Ga. 882, 268 S.E.2d 349, cert. denied, 449 U.S. 938 (1980).
54.	Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 446 U.S. 988 (1980).
55.	Stevens v. State, 245 Ga. 583, 266 S.E.2d 194 (1980).

No. on Table	Case
56.	Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980).
57.	Spraggins v. State, 243 Ga. 73, 252, S.E.2d 192, vacated and remanded, 446 U.S. 961, reaffirmed, 246 Ga. 432, 271 S.E.2d 828 (1980), cert. denied, U.S. , 101 S. Ct. 2000 (1981).
58.	Hill v. State, 246 Ga. 402, 271 S.E.2d 802 (1980), cert. denied, U.S. , 101 S. Ct. 2001 (1981).
59.	Green v. State, 246 Ga. 598, 272 S.E.2d 475 (1980), cert. denied, U.S. , 101 S. Ct. 1402 (1981).
60.	Cape v. State, 246 Ga. 520, 272 S.E.2d 487 (1980), cert. denied, U.S. , 101 S. Ct. 956 (1981).
61.	Dick v. State, 246 Ga. 697, 273 S.E.2d 124 (1980).
62.	Solomon v. State, 247 Ga. 27, 277 S.E.2d 1 (1980), cert. denied, U.S. , 101 S. Ct. 2348 (1981).
63.	Nelson v. State, 247 Ga. 172, 274 S.E.2d 317 (1981).
64.	Tyler v. State, 247 Ga. 119, 274 S.E.2d 549 (1981).
65.	Brown v. State, 247 Ga. 298, 275 S.E.2d 52, cert. denied, No. 80-6839 (Oct. 5, 1981).
66.	Thomas v. State, 245 Ga. 688, 266 S.E.2d 499 (1980), vacated and remanded, U.S. , 101 S. Ct. 523, reaffirmed, 247 Ga. 233, 275 S.E.2d 318 (1981).
67.	Messer v. State, 247 Ga. 316, 275 S.E.2d 15 (1981).
68.	Stephens (Stevens) v. State, 274 Ga. 698, 278 S.E.2d 398 (1981).
69.	Zant v. Gaddis, 247 Ga. 717, 279 S. E.2d 219 (1981).
70.	Cervi v. State, No. 37316 (slip op., Ga. Sup. Ct. Sept. 29, 1981).
71.	Wallace v. State, No. 37517 (slip op., Ga. Sup. Ct. Sept. 30, 1981).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Eighth Amendment

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment: Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Georgia Code Annotated

§ 27-2503 Presentence hearing in felony cases

"(a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of 'guilty' by the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In such hearing the judge shall hear additional

evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument. In cases in which the death penalty may be imposed, the judge when sitting without a jury shall follow the additional procedure provided in section 27-2534.1. Upon the conclusion of the evidence and arguments the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

"(b) In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in section 27-2534.1, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law."

§ 27-2514 Sentence of death; copy for penitentiary superintendent. Time and mode of conveying prisoner to penitentiary. Expenses

"Upon a verdict or judgment of death made by a jury or a judge, it shall be the duty of the presiding judge to sentence such convicted person to death and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person, and a certified copy thereof shall be sent by the clerk of the court in which said sentence is pronounced to the superintendent of the State penitentiary, not less than 10 days prior to the time fixed in the sentence of the court for the execution of the same; and in all cases it shall be the duty of the sheriff of the county in which such convicted person is so sentenced, together with one deputy or more, if in his judgment it is necessary, and provided that in all cases the number of guards shall be approved by the trial judge, or if he is not available, by the ordinary of said county in which such prisoner is sentenced, to convey such convicted person to said penitentiary, not more than 20 days nor less than two days prior to the time fixed in the judgment for the execution of such condemned person, unless otherwise directed by the Governor, or unless a stay of execution has been caused by appeal, granting of a new trial, or other order of a court of competent jurisdiction, and the expense for transporting of said person to the penitentiary for the purpose of electrocution shall be paid by the ordinary of the county wherein the conviction was had, or the board of county commissioners, the county commissioner, or other person or persons having charge of the county funds, out of any funds on hand in the treasury of such county.

§ 27-2534.1 Mitigating and aggravating circumstances; death penalty

"(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

"(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

"(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

"(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

"(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

"(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed."

§ 27-2537 Review of death sentences

"(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

"(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

"(c) With regard to the sentence, the court shall determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

"(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

"(1) Affirm the sentence of death; or

"(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

"(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

"(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

"(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

"(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal

shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

Rules of the Supreme Court of Georgia

Rule 34. (Codified at Ga. Code Ann. §24-4534)

(a) Any breach of one or more of these rules, whether intentionally or by inexcusable negligence, will subject the offender to be dealt with for contempt or by revocation of the privilege of practicing before this court.

(b) The court considers it the duty of counsel for the appellee as well as the appellant to timely comply with these rules.

Opposition

81-5749

NO. ~~81-5749~~

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ORIGINAL COPY

ALPHONSO MORGAN,

Petitioner,

v.

CHARLES MONTGOMERY, WARDEN, GEORGIA STATE PRISON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether or not the actions by Petitioner's counsel on appeal to the Georgia Supreme Court sufficiently afforded him effective assistance of counsel and an adequate review by said court?

II.

Whether Petitioner's statements to police were properly admitted at his trial?

III.

Whether Petitioner's death penalty was properly imposed under Ga. Code Ann. § 27-2534.1(b)(7) and in light of Godfrey v. Georgia, 446 U.S. 420 (1980)?

IV.

Whether the failure to transcribe the prosecutor's closing arguments has violated Petitioner's right to due process on appeal, when Petitioner has not alleged that any error had occurred during the course of said argument?

V.

Whether it was necessary for the trial court to give explanatory instructions pertaining to the jury's consideration of mitigating circumstances during Petitioner's trial in sentencing, and in the absence of said instructions whether the Supreme Court of Georgia properly affirmed Petitioner's death sentence?

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PART ONE

STATEMENT OF THE CASE

On May 20, 1977, the Richmond County, Georgia Grand Jury returned a three count indictment against the Petitioner, and his co-defendants, Jose High and Judson Ruffin, charging them with the armed robbery, kidnapping and murder of James Gray. (R. 4-6).[1/] Petitioner was tried separately from his co-defendants, and on July 14, 1977, he was found guilty on all counts, and was sentenced to life imprisonment for armed robbery, twenty years concurrent for kidnapping, and he received the death penalty for murder. (R. 13-14). The death penalty on the murder count was supported by the jury's finding of a statutory aggravating circumstance, to wit: "The offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." On July 18, 1977, four days after his conviction and sentence, Petitioner executed his own notice of appeal, filing same on July 22, 1977. (R. 1-3).

Petitioner's convictions were affirmed by the Georgia Supreme Court on direct appeal, and his initial petition for writ of certiorari and rehearing in the United States Supreme Court were denied. Morgan v. State, 241 Ga. 485, 246 S.E.2d 198 (1978) [three justices dissenting from death sentence] cert. den., 441 U.S. 976 (1979) [two justices dissenting], rehng. den., 444 U.S. 976 (1979) [four justices dissenting].

1/ References to the pagination of the official record from Petitioner's trial in Richmond County, Georgia shall be referred to in this brief as (R. ___). References to the pagination of Petitioner's trial transcript shall be referred to as (T. ___). References to the pagination of Petitioner's state habeas corpus transcript from the Superior Court of Tattnall County, Georgia shall be referred to as (HC. ___).

Following the affirmance of Petitioner's convictions and sentences on appeal and the denial of certiorari by this Court, Petitioner filed an application for state habeas corpus relief in the Superior Court of Tattnall County, Georgia. Following an evidentiary hearing, said court in an order dated March 25, 1981 denied relief. (See Petitioner's Appendix p. A.28-A.53). Petitioner's application for a certificate of probable cause to appeal to the Georgia Supreme Court was denied by the Georgia Supreme Court in an order dated June 23, 1981. [one justice dissenting]. (Petitioner's Appendix, p. A.07). Thereafter, Petitioner filed this instant petition for a writ of certiorari under 28 U.S.C. § 1257(3).

PART TWO

STATEMENT OF THE FACTS

A summary of the facts which the jury was authorized to find is set out in the opinion of the Georgia Supreme Court. Morgan v. State, supra. The evidence overwhelmingly showed that the Petitioner and his co-defendants had brutally and callously engaged in the kidnapping, armed robbery and execution-style murder of their victim. In the early morning hours of August 23, 1976, a security guard at a rural Georgia airport had been checking the perimeter of a security fence when he found the body of James Gray lying in a grassy area near Gray's truck. (T. 76). Half of Gray's head was blown off; it was described as a "mass of pulp." (T. 77). His body was later identified by a long time friend who was a night superintendent at a company in South Carolina. (T. 83, 188).[2/]

2/ James Gray was a resident of South Carolina.

Police Investigator J. B. Dykes stated that near the body he found an ear, skull fragments, a medicine bottle with the victim's name on it, broken eye glasses and shotgun wadding. (T. 100). The victim's shirt was tied around his head and neck like a blindfold, and had what appeared to be two bullet holes in it. (T. 89, 101-102). The left side of the skull was blown away from the remainder of the head, and there was brain matter found under the detached portion of the skull. (T. 101-102). An examination of the victim also showed that the pockets of his trousers had been partially pulled out, and there was nothing found in his pockets. (T. 101, 103). Although he was not wearing a watch, there was a suntan line around his right wrist where a watch apparently had usually been worn. (T. 101). Officer Dykes discovered tire tracks and a tennis shoe print. (T. 106-107). The shoe print was later examined and found comparable in size and tread to tennis shoes which had been worn by Jose High, one of Petitioner's co-defendants. (T. 108).

Dr. William Murphy who performed the autopsy, removed the lead shot and wadding from the victim's head. (T. 86-87, 94). According to Dr. Murphy, the shotgun was placed directly against the victim's head, causing gases from the shot to enter the head and blow the skull outward. (T. 95).

Nancy Gray the victim's wife testified that her husband had taken her to the hospital on August 22, 1976, the day before his body was found. When he left her he had ninety dollars in cash, and an uncashed check. (T. 190). She stated that her husband normally would have left his home around 11:30 p.m. in order to arrive for the midnight shift at the mill where he worked. (T. 188).

Several witnesses observed a white Plymouth automobile in the vicinity of the victim's residence on Dixie Clay Road in the late evening hours of August 22, 1976. Witness Joseph Van Buren was in a parked car with his girlfriend, a Ms. Hamlet,on Pine Log Road at approximately 11:00 p.m. on August 22, 1981. (T. 171). Van Buren noticed a white car with a CB antenna on the back parked about 50 yards away. Three black males were standing outside the car, behaving in a rowdy fashion, drinking, and throwing cans onto the road and yelling at passing cars. (T. 173-174). When Van Buren left, he drove past the white car and the three men yelled at him. (T. 175). Phillip Jackson also observed the white Plymouth with a CB antenna in the Pine Log Road vicinity at approximately 10:00 or 10:30 p.m. on August 22. (T. 165-157, 169). Both Jackson and Van Buren identified a photograph of a white Plymouth Satellite which had been introduced as the picture of a car belonging to Judson Ruffin, one of Petitioner's co-indictees. (T. 161-164, 169, 175, 176-177).

Charles Carter, who lived on Pine Log Road, testified that he was driving on the road at approximately 11:15 p.m. on August 22, when he saw a white car parked near the Hamlet home. (T. 180-181).

As Carter drove by, the white car blew its horn. (T. 181). Carter then turned onto Dixie Clay Road, where he saw the victim backing out of his driveway in his pickup truck. (T. 181). Ms. Gray testified that the Hamlet home, at the intersection of Pine Log and Dixie Clay Roads was approximately one quarter of a mile from the victim's home. (T. 189). Ms. Gray further testified that her husband's route to work was to drive down Dixie Clay Road, then turn onto Pine Log Road. (T. 190).

A Jackson v. Denno hearing was held out of the jury's presence to determine the voluntariness of a statement which had been made by the Petitioner following his arrest on August 28, 1976. (T. 109-122). In the course of the hearing, Investigator Dykes stated that Petitioner's co-defendant, Jose High had been previously arrested and during the course of his interrogation had named Petitioner as a participant in several crimes, including the Gray murder. (T. 111). Fearing that the Petitioner might flee upon learning of High's arrest, the police immediately went to Petitioner's address, as furnished to him by High, and placed Petitioner under arrest. (T. 111-113). Investigator Allen testified that Jose High's statements to them pertaining to other crimes and Petitioner's involvement were corroborated by independent evidence uncovered in their investigation of a number of homicides, rapes, kidnappings and robberies in which the modus operandi had been similar. (T. 111-112). Upon arresting Petitioner, Investigator Dykes fully advised him of his Miranda warnings before taking a statement. (T. 115-117). The trial court found Petitioner's statements to be voluntary. (T. 122).

Investigator Dykes then repeated his testimony for the jury regarding advising Petitioner of his Miranda warnings. (T. 124-127). Dykes stated that while questioning Petitioner, Petitioner admitted that he was at the scene of the Gray murder, (T. 128); however, Petitioner claimed that Jose High forced him to shoot Gray. (T. 128). According to Petitioner's statement, he was in Ruffin's car with Ruffin and High when they drove to South Carolina and had stopped an old white man in a pickup truck and held their shotguns on him. (T. 131). Victim Gray was forced into the trunk of the automobile, while Judson Ruffin drove the truck to Augusta, and Jose High and the Petitioner drove ahead of the truck in the Plymouth. (T. 131). Petitioner

told the police that they drove to Bush Field, where they pulled Mr. Gray from the trunk. According to Petitioner, Jose High stated, "This is where we are going to kill him." (T. 131). Petitioner further related that when they arrived at the field, Jose High blindfolded Gray with the victim's shirt. (T. 132). At this point, Gray told them that his wife was sick and he pleaded that he not be killed. (T. 132). Dykes related that Petitioner admitted shooting Gray with a single-barrel shotgun, and recited that Ruffin then shot the victim with a double-barrel shotgun. (T. 132, 141). Ruffin took the victim's watch, then all three men drove to a Church's Fried Chicken where they purchased dinner with the victim's money while Jose High laughed about it. (T. 132). In his statement, Petitioner related that Jose High kept the weapons. (T. 132).

Investigator Dykes testified that two twelve-gauge shotguns, loaded with No. 6 bird shot, one single-barrel and one double-barrel were recovered from the yard of Jose High's house. (T. 126). While making his statement to the police, Petitioner pointed to the single-barrel shotgun lying nearby, and indicated that he had shot Gray with "'that bolt-action shotgun.'" (T. 131).

The following day, Petitioner was again advised of his Miranda warnings, (T. 132), and was asked by Investigator Dykes why he had killed Gray. Petitioner shrugged his shoulders and said, "Because he's white." (T. 132).

Following the state's presentation of its case, the defense moved for a directed verdict of acquittal on the kidnapping and armed robbery charges, (T. 163); however, this motion was overruled. (T. 195).

The defense called as its only witness, Mr. Bob Ingram, a special agent with the Georgia Bureau of Investigation. (T. 195-196). Ingram had been listed as a state witness; however he was never called by the state. Ingram related that he was involved in the investigation of a number of crimes in Richmond County, and was contacted when the Petitioner and his co-defendants had been arrested. (T. 197-198). Ingram testified that he had interviewed Jose High, who had stated that he was the leader of a family whose purpose it was to kill, rob and rape people. (T. 197, 200). Ingram also read his notes pertaining to a statement made by Petitioner. (T. 201). In the statement, Petitioner related how he, Jose High and Judson Ruffin had taken Gray to Bush Field and had blindfolded him. (T. 202). According to this statement, High gave Petitioner a gun and told him to shoot Gray. (T. 202). Petitioner stated to Ingram that he had refused at first, but when High threatened to shoot him, Petitioner then shot Gray in the shoulder. (T. 202). Petitioner related that Ruffin then shot Gray in the head. (T. 202). High supposedly threatened the Petitioner by stating if Petitioner told the police anything, he would kill Petitioner and the Petitioner's family. (T. 203). Petitioner related to Ingram that High took the victim's wallet; they then drove to a chicken place to eat, before Petitioner was driven home. (T. 203).

Investigator Ingram also testified that Judson Ruffin had told him that both he and the Petitioner had shot Gray. (T. 204). In High's statement to Ingram, High had contended that he had not forced the Petitioner to shoot Gray. (T. 204). All three co-indictees, including the Petitioner, mentioned other murders that they had committed. (T. 205).

Upon questioning by the state, Detective Ingram verified that he had no evidence from either Ruffin or High to demonstrate that Morgan had been coerced into shooting the victim. (T. 206). Ingram further verified that the photograph of the victim did not show any shoulder wounds, as was mentioned by Petitioner. (T. 213).

As was previously noted, Petitioner was convicted of armed robbery, kidnapping and murder, receiving a life sentence for armed robbery, a twenty year concurrent sentence for kidnapping and the death penalty for murder. (R. 13-14).

Additional facts may be related in the following portion of this brief when relevant to explain circumstances surrounding the arguments which have been raised.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONER WAS SUFFICIENTLY REPRESENTED BEFORE THE GEORGIA SUPREME COURT ON DIRECT APPEAL OF HIS CONVICTIONS AND SENTENCES.

Petitioner's first argument focuses upon the sufficiency of the representation which he received from his attorney, Mr. Chris Nicholson, on direct appeal to the Georgia Supreme Court. In summary, he asserts that the Georgia Supreme Court's affirmance of his death penalty was unconstitutional, because of various omissions and inaction by his attorney, and because the absence of a transcript of closing arguments denied Petitioner his only opportunity to alert the Court to the mitigating circumstanes involved in the case. In support of his argument, Petitioner notes that counsel did not file a notice of appeal, did not file enumerations of error or a brief on Petitioner's behalf until directed to do so by the Georgia Supreme Court, filed an allegedly inadequate brief, did not appear for oral argument, and failed to file a supplemental brief.

It is clear that the United States Constitution does not require that a state provide appellate courts or the right to appellate review. There is no constitutional right to appeal. Griffin v. Illinois, 351 U.S. 12 (1956). However, when a state does provide a right to appeal, it must meet the requirements of due process and equal protection. Douglas v. California, 372 U.S. 353 (1963). Of course, it is also required that a criminal defendant receive effective assistance of counsel at trial and on his appeal. Ogle v. Estelle, 641 F.2d 1122 (5th Cir. 1981); Passmore v. Estelle,

594 F.2d 115 (5th Cir. 1979). As noted recently by this Court in Cuyler v. Sullivan, 446 U.S. 335 (1980), the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution attaches whether or not counsel is appointed or retained.

Here, prior to trial Attorney Nicholson conferred with counsel for Petitioner's co-defendants to try to prepare a defense for the case. (HC. 116). Nicholson also attended the co-defendant's preliminary hearings, interviewed Petitioner on numerous occasions, and interviewed other witnesses himself. (HC. 119-121). He investigated Petitioner's statement to police, and challenged its voluntariness at trial. (HC. 121-122). Petitioner was unable to provide any help in proving that he did not participate in the murder. (HC. 121). Attorney Nicholson recognized from the very beginning of the case that mitigation of the murder was Petitioner's only realistic hope. (HC. 112, 120, 123-124). Thus, he focused on attempting to portray Petitioner as having been coerced or forced into shooting the victim, and tried to place responsibility for the shooting on Petitioner's co-defendant, Jose High, as the ring leader of the group, and as the person who was the prime mover and instigator of the robbery, kidnapping and murder. (HC. 124; see T. 133-141). Attorney Nicholson knew, however, that Petitioner had been implicated in other armed robberies, rapes and murders. (HC. 111. 125; see, T. 111-112). Thus, although Nicholson had knowledge of Petitioner's background (HC. 113), he had no intention of calling character witnesses and placing Petitioner's character and background into issue, because this would have opened the door for the prosecution to question those witnesses about their knowledge of Petitioner's participation in these other crimes. (T. 125). There was a strong possibility that the jury, after hearing over and over again, questions

pertaining to the Petitioner's participation in other rapes, burglaries and murders, could have concluded that Petitioner's character was actually despicable, and the community need not be subjected to the potential of his future marauding.

Thus, Nicholson, after consulting with Petitioner, decided not to call Petitioner as a witness in the case, (HC. 113), but chose to rely upon a strong closing argument. Of course, under Georgia law an attorney's closing arguments are limited to the facts which are in evidence, or inferences and deductions which may be drawn from the evidence which was before the jury. Hill v. State, 236 Ga. 703, 224 S.E.2d 907 (1976). Thus, Attorney Nicholson's closing arguments, presenting mitigating factors, must have been based on evidence which was presented during the trial. The Georgia Supreme Court had before it the testimony which defense counsel elicited from Georgia Bureau of Investigation Agent Ingram, pertaining to Petitioner's own self-serving declaration that he had been coerced into shooting the victim. Thus, the Court was able to weigh this evidence against Petitioner's other statements to Investigator Dykes, and against the statements of the other co-indictees who did not mention any coercion, and finally in light of the actual evidence which contradicted his statement to Agent Ingram: that being that in his statement to Ingram he claimed he shot the victim in the shoulder; however, no shoulder wound was present on the victim's body.

Although it is true that Attorney Nicholson did not file the notice of appeal, the record shows that Petitioner prepared his own notice only four days after his conviction. (R. 1; Petitioner's Appendix, p. A. 74-75). Under Georgia law Mr. Nicholson had thirty days within which to file a notice of appeal, and in any case, review of a death penalty case is mandatory. Ga. Code Ann. §§ 6-803; 27-2537. Following trial, Petitioner had written

the judge requesting another attorney for appeal, and Mr. Nicholson had been contacted by Attorney Archie Gleson who had made arrangements to work on the case. Apparently, some confusion resulted over who was going to represent the Petitioner on appeal, thus resulting in the delay in the filing of the enumeration of errors and the brief. Ultimately, as Petitioner acknowledges, Attorney Nicholson did file a brief on Petitioner's behalf, although he did not appear for oral argument nor file a supplemental brief. (HC. 115). Respondent submits that while these latter omissions certainly should not be condoned; nevertheless, they do not rise to the level of ineffective assistance of counsel nor a deprivation of Petitioner's due process rights, and certainly have no bearing upon whether Petitioner's conviction should be reversed. As the state habeas corpus court which reviewed Petitioner's petition noted in its order, the rules of the Georgia Supreme Court permitted, but did not require at the time of Petitioner's appeal, that defense counsel orally argue his contentions before the Court. Supreme Court Rule 23(a) (1975); (see, Petitioner's Appendix A, p. A. 30). There is no consitutional authority which establishes a requirement that appellate cases be orally argued. Ogle v. Estelle, supra, 641 F.2d at p. 1127.

It is clear that Petitioner's counsel did not file a supplemental brief on a question raised by the Georgia Supreme Court during oral argument; however, as noted by the state habeas court, the question raised ultimately resulted in the Supreme Court's finding that there was no error pertaining to that issue. Consequently, the omission by counsel was at most harmless. Mendiola v. Estelle, 635 F.2d 487 (5th Cir. 1981)

Petitioner also points to the appellate court's receipt of the trial judge's report after oral argument. It is clear, however, that the report was received before the Georgia Supreme Court made its final decision in the case. (Petitioner's Appendix A.118). Contrary to Petitioner's assertions, the trial judge was not in error in listing no mitigating circumstances. Petitioner's youth, 18 years of age, should not have been considered as mitigating. He was 5 years past the minimum age required for the imposition of criminal, legal responsibility (Ga. Code Ann. § 26-701), and a young adult, fully accountable for his actions. From the evidence adduced at trial, it appeared that Petitioner had been an active participant in numerous other murders, rapes and robberies. (T. 112, 205). The trial judge, and apparently the jury who heard the evidence, had concluded that Petitioner's statement to Investigator Ingram, that he was under duress at the time of the crime, was unbelieveable.

In conclusion, since the Georgia Supreme Court had a sufficient record before it to review the case, and since counsel rendered sufficiently effective assistance at trial and on appeal, this Court should decline to grant the writ of certiorari to review Petitioner's first argument.

II. PETITIONER'S STATEMENTS MADE TO THE POLICE FOLLOWING HIS LAWFUL ARREST WERE EXAMINED IN A FULL AND FAIR HEARING, AND WERE PROPERLY FOUND TO BE FREELY AND VOLUNTARILY MADE, AND THUS ADMISSIBLE FOR THE JURY'S CONSIDERATION.

Petitioner's second argument requires a combined analysis of the alleged violations of Petitioner's Fourth, Fifth and Fourteenth Amendment rights. He claims that his inculpatory statement made to the police was the result of a direct exploitation of his illegal arrest, and thus should have been excluded at trial. He further contends that the trial court's failure to conduct a full and fair hearing on his Fourth and Fifth Amendment claims constituted a due process violation depriving him of a full and fair hearing. All of these assertions are vacuous.

As in most cases involving a Fourth Amendment claim, an analysis of the factual situation is most important. Petitioner's brief correctly notes that Petitioner was arrested at approximately dawn on Saturday, August 28, 1976, while at his home. (T. 108). The circumstances leading to his arrest and his later confession, were related by arresting officer J. B. Dykes.

The police had been engaged in the investigation of a number of similarly related homicides, rapes, kidnappings and robberies. (T. 111). One of the Petitioner's co-defendants, Jose High, had been arrested on Friday night, August 27, 1976 and was questioned by the police, after he had been observed lurking in the shadows at the scene of a kidnapping and rape.

(T. 111). It should be noted that Petitioner did not challenge the legality of the arrest of Jose High, nor the voluntariness of his confession.

During the questioning of Jose High, he eventually acknowledged that he and his accomplices had committed a number of crimes which the police had been investigating, including the murder of victim Gray. High named Petitioner Morgan as being directly involved in Gray's murder, as well as the kidnapping/rape for which High had been arrested, in addition to two other murders. (T. 112). Investigator Dykes classified High's information as being very reliable, because much of the information which he gave the police corresponded to and was corroborated by information which the police had gained through the independent investigations of the various other crimes. (T. 111, 117-118). Also, one of the people who had identified High at a lineup, indicated that High's partner was named something like "Alonso." (T. 117).

Thus, in the predawn hours on Saturday, August 28, 1976, the police first learned of Petitioner Morgan's participation in the Gray murder. Contrary to Petitioner's assertions, the aforesaid amply established sufficient probable cause to support Petitioner's arrest. Spinelli v. United States, 393 U.S. 410 (1969); United States v. Harris, 403 U.S. 573 (1971).

> "Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make - whether at that moment the facts and circumstances within their knowledge and of which they

had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964), citing Brinegar v. United States, 338 U.S. 160 (1949).

The further actions of the police in proceeding to arrest the Petitioner without securing an arrest warrant, must be viewed in light of the circumstances as they existed at the time the arrest occurred. When Petitioner's involvement in several of the crimes became known, it was shortly before dawn on a Saturday morning. The police were aware that the murder of victim Gray had taken place just a few days before, on August 22, 1976. Petitioner's co-defendant, Jose High, had implicated Petitioner not only in the brutal, execution-style shotgun murder of Gray, but also implicated him in several other murders in violent crimes. The police had good reason to believe that Petitioner was armed, posing a danger not only to the public but also to the police themselves. Investigator Dykes specifically stated that he was concerned that if the police waited, expending valuable time to secure an arrest warrant, the Petitioner may have discovered High's arrest, and would have fled. (T. 112, 119). Rather than expending the time, attempting to secure an arrest warrant during the predawn hours on a Saturday morning, the police proceeded directly to the address given to them by Jose High, and engaged in a reasonable arrest. Police went to the address that High had given them, knocked on the door, and Petitioner's mother permitted them to enter. Upon observing Petitioner in a hallway, he was immediately arrested. (T. 119-120).

He was advised of his Miranda warnings on three occasions before he made his statement to Investigator Dykes. He received Miranda warnings at his house, (T. 124), and he again was advised of his rights when placed in the police patrol car at the scene. (T. 115, 125). Petitioner acknowledged that he understood his rights. (T. 115, 125). He was then transported to the local jail, and at approximagely 7:00 a.m. he was again advised of his rights a third time, and again acknowledged his understanding. (T. 116-117). Petitioner's voluntary statements were made without threats or coercion, and were not induced by promises or hopes of reward. (T. 117).

It is clear from the examination of the Jackson v. Denno hearing, and from the testimony at trial that Petitioner's incriminatory statements and confessions were freely and voluntarily made and therefore admissible. Jackson v. Denno, 378 U.S. 395 (1964). Of course, the voluntariness of a confession need only be established by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477 (1972). In determining whether the state had met the burden, the trial judge must look to the totality of the circumstances. Clewis v. Texas, 386 U.S. 707 (1967). Petitioner asserts here that the confession was involuntarily given, and that he did not receive a full and fair Jackson v. Denno, hearing. Contrary to Petitioner's assertions, there is nothing in the record to show that the trial court excluded testimony which suggested that Petitioner did not understand that his oral statements could be used against him. The trial court did not cut short the hearing as Petitioner suggests, Petitioner simply did not offer testimony in his behalf, although he had an opportunity to do so. (T. 122). Furthermore, Petitioner's counsel had a full opportunity to cross-examine Officer Dykes, and could

have questioned him about any deception or trickery utilized by the police. Although Petitioner asserts that the trial court took no account of Petitioner's youth and intelligence, there is also nothing in the record to support this assertion.

In conclusion, Respondent submits that Petitioner had a full and fair hearing on the question of the admissibility of his confession to the police. The record shows that the confession was properly obtained following a warrantless arrest which had been based upon exigent circumstances, and only after Petitioner had been fully advised of his rights.

For all of the aforesaid reasons, this Court should decline to grant the writ to review Petitioner's second argument.

III. THE SUPREME COURT OF GEORGIA PROPERLY AFFIRMED PETITIONER'S DEATH SENTENCE UNDER GA. CODE ANN. § 27-2534.1(b)(7).

As has been previously noted, following the sentencing portion of Petitioner's trial, the jury returned a death penalty verdict based upon its finding that the murder in this case was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. Ga. Code Ann. § 27-2534.1 (b)(7). Petitioner asserts that the affirmance of Petitioner's death penalty by the Georgia Supreme Court was improper, because the jury which imposed the death penalty under the aforesaid statute, was unguided as to the meaning and application of the statutory aggravating circumstance. Petitioner further asserts that the appellate review by the Georgia Supreme Court did not, and could not cure the alleged insufficient instructions, and furthermore that the evidence was insufficient to support the jury's finding under (b)(7).

The trial court's sentencing instructions have been reproduced in Petitioner's Appendix. (Petitioner's Appendix, p. A.62-A.64). The court had instructed the jury that before it was authorized to find for the death penalty, it was necessary for them to find a statutory aggravating circumstance beyond a reasonable doubt. The court instructed on the statutory definition of the (b)(7) aggravating circumstance, and further defined aggravated battery. (Petitioner's Appendix, P. A-63). It is clear that except for the term aggravated battery, the trial court did not specifically define the terminology within Ga. Code Ann. § 27-2534.1(b)(7). The trial court did give the statutory definition of aggravated battery.

In other cases, the Georgia Supreme Court has recognized that with the exception of the term "aggravated battery," the remainder of the terms contained under (b)(7) require no explication. Gilreath v. State, 247 Ga. 814, 836, 279 S.E.2d 650 (1981); Stevens v. State, 245 Ga. 583, 586, 266 S.E.2d 194 (1980), cert. den., ___U.S.___, 101 S.Ct. 251 (1980); Burger v. State, 245 Ga. 458, 462, 265 S.E.2d 796 (1980), cert. den., 446 U.S. 988 (1980). This holding by the Georgia Supreme Court was correct. Recently, in Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), cert. den., ___U.S.____, 101 S.Ct. 796 (1980), the Georgia Supreme Court engaged in a detailed analysis of Ga. Code Ann. § 27-2534.1 (b)(7). In regards to the first portion of the aggravating circumstance, the court stated:

> "The phrases 'outrageously or wantonly vile, horrible or inhuman' are words of common understanding, have essentially the same meaning, and are included in the statute to distinguish ordinary murders for which the penalty of death is not appropriate, from those murders for which the death penalty

may be imposed." Citing Godfrey v. Georgia, 446 U.S. 420 (1980). Hance, supra, at p. 861.

Godfrey v. Georgia, specifically dealt with the application of Ga. Code Ann. § 27-2534.1(b)(7) in that case. The jury in Godfrey recommended a death sentence based only upon a partial finding under (b)(7) that the murder of the victim had been "outrageously or wantonly vile, horrible and inhuman." It was in this regard that the Court held that there was nothing in these few words, standing alone, that implied any inherent restraint upon the arbitrary and capricious infliction of the death sentence. This Court specifically reviewed the remainder of the (b)(7) aggravating circumstance, which required either an aggravated battery to the victim, torture to the victim, or depravity of mind of the defendant, and found all lacking.

In the instant case, the jury made a complete finding under the (b)(7) aggravating circumstance, and as opposed to Godfrey, the wording of the jury's finding in this case is sufficiently definite to insure against any arbitrary or capricious infliction of the death sentence, and the record as reviewed by the Georgia Supreme Court, demonstrated ample evidence to support the jury's finding that the victim suffered from mental torture and that the Petitioner had demonstrated his depravity of mind beyond all doubt. As noted by the Georgia Supreme Court in Hance,

> "Evidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical

abuse (i.e., torture of the victim), and also will support a finding of depravity of mind of the defendant." Hance, supra, at p. 861.

In conclusion, because of the simplicity of the terms utilized within the (b)(7) aggravating circumstance, it was not necessary for the trial court to specifically define those terms. The facts of this case amply show that it fell within the perimeters of the (b)(7) aggravating circumstance, and the propriety of the jury's determination was further insured by the mandatory review on appeal by the Georgia Supreme Court.[3/] Specifically with regard to Ga. Code Ann. § 27-2534.1(b)(7), the Georgia Supreme Court has stated that it has no intention of permitting that Code Section to become a "catchall" for cases simply because no other statutory aggravating circumstance has been raised by the evidence. Harris v. State, 237 Ga. 718, 730, 230 S.E.2d 1 (1976), cert. den., 431 U.S. 933 (1977). The Georgia court further stated in Harris, its intention to restrict its approval of the death sentences supported by Code Section 27-2534.1(b)(7) to those cases which lie not on the periphery of the statutory borders, but only to approve those sentences which are so outrageous and vile so as to lie at the core of the statutory intent. As the prior statement of facts amply demonstrates, the facts surrounding the murder of victim Gray fall well within the purview of the (b)(7) aggravating circumstance, in that they demonstrate beyond all doubt the wanton, vile and inhuman nature of the execution murder and mental torture to the victim

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3/ Under Ga. Code Ann. § 27-2537(c), the Georgia Supreme Court must review all death penalty cases to determine:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (2) Whether in cases other than treason or aircraft highjacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 27-2534.1(b), and (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

and the depravity of mind on the part of the Petitioner. Petitioner has never shown any remorse for his acts, and at the state habeas corpus hearing denied participating in the crime or that he even knew Judson Ruffin or Jose High. (HC. 89, 92, 100-101).

Of course, in a capital case, jury discretion must be sufficiently guided so as to avoid the arbitrary and selective imposition of the death penalty. Furman v. Georgia, 408 U.S. 238 (1972). This Court in Gregg v. Georgia, 428 U.S. 153 (1976) reviewed the Georgia statutory procedures for the imposition of the death penalty, and refused to declare the (b)(7) aggravating circumstance unconstitutionally vague, recognizing that the mandatory review by the Georgia Supreme Court could insure its constitutional application. Id., at p. 201. Since the Georgia Supreme Court engaged in such a review, finding that the facts amply fit within the jury's finding under (b)(7), and since Petitioner's case lies at the core of the (b)(7) aggravating circumstance, it should not be held that the trial court's failure to explain the specific terms contained therein operated to deprive Petitioner of any of his constitutional rights.

Since it is clear that in the instant case, the statutory mandated procedures for implementation of the death penalty were properly complied with, and that none of Petitioner's statutory or constitutional rights have been violated, this Court should refuse to grant certiorari to review the issues raised by Petitioner pertaining to the implementation of his death penalty pursuant to Ga. Code Ann. § 27-2534.1(b)(7).

IV. THE FAILURE TO TRANSCRIBE THE PROSECUTIC :'S CLOSING ARGUMENT AT PETITIONER'S TRIAL, PRESENTS NO GROUND FOR HABEAS CORPUS RELIEF WHEN PETITIONER HAS FAILED TO SHOW HARMFUL ERROR OCCURRED DURING SAID ARGUMENT.

In his fifth allegation, Petitioner contends that the lack of a transcript of the closing argument in his case mandates review and, obstensibly, the vacating of his death penalty.

The evidence in this case shows that neither the closing arguments during the guilt/innocence nor during the sentencing phase of Petitioner's trial were transcribed and made a part of the record on appeal. That the closing argument was not transcribed, does not mean that it was not recorded. However, Georgia law does not require such transcription unless error is alleged. The state habeas corpus court correctly applied state law, citing Ga. Code Ann. § 27-2401[4/] and Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92 (1978). (Petitioner's Appendix p. A.37-38).

4/ Ga. Code Ann. § 27-2401 provides in part as follows:

> "On the trial of all felonies the presiding judge shall have the testimony taken down, and, when directed by the judge, the court reporter shall exactly and truly record, or take stenographic notes of, the testimony and proceedings in the case, except the argument of counsel . . ."

Additionally, Ga. Code Ann. § 6-805(d) provides:

> "Where a trial in any civil or criminal case is recorded by a court reporter, all motions, colloquies, objections, rulings, all evidence - whether admitted or stricken on objection or otherwise - copies or summaries of all documentary evidence, the charge of the court, and all other proceedings which may be called into question on appeal or other post-trial procedure shall be recorded, and where the report is transcribed, all such matters shall be included in the written transcript . . ."

In Stephens, the Supreme Court of Georgia said, "We are unable, however, to accept the proposition that the failure to transcribe the closing arguments of counsel requires the death penalty automatically to be set aside." Id., at p. 600-601. This ruling has been reaffirmed in later cases. See Bowden v. Zant, 244 Ga. 260, 260 S.E.2d 465 (1979); Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979).

Had there been objectionable argument made during closing argument, upon objection by counsel, Georgia law requires such potentially objectionable arguments to be transcribed. In the present case, it is apparent that there was no such argument to which objection had been made, since it would have been made part of the record by state law.

Furthermore, Petitioner has had ample opportunity, even without transcription, to make some showing that closing argument contained objectionable material. Yet the strongest argument which Petitioner makes is purely hypothetical.

Respondent is aware of no cases in which speculation without foundation has established sufficient error to warrant reversal. On the contrary, both state and federal law require some showing beyond the mere possibility of error. Petitioner in this case has had not only the burden, but the opportunity, to establish error, but has not done so. Indeed, absent a transcription, it is to Petitioner's benefit to speculate and rely upon the mere possibility that error occurred.

Petitioner had the opportunity to take the witness stand and testify whether passion, prejudice, race, the possibility of parole, or any other improper argument was made. He did not do so. The trial attorney was also present at the state

habeas corpus hearing; however, Petitioner's counsel did not inquire of the trial attorney whether he recalled any improper arguments having occurred. Neither the district attorney, nor the trial judge were questioned in this area.

In conclusion, Respondent submits that since Petitioner has failed to even allege that any improper argument occurred, this Court should refuse to grant certiorari to review whether the absence of a transcript of the closing arguments at Petitioner's trial resulted in a violation of his constitutional rights.

PART FOUR

REASONS FOR GRANTING THE WRIT

I. SINCE THIS COURT IS THE FINAL ARBITRATOR OF FEDERAL CONSTITUTIONAL LAW AS DECIDED BY EITHER FEDERAL OR STATE COURTS, PLENARY REVIEW ON CERTIORARI IS APPROPRIATE AND NECESSARY TO ALLEVIATE A CONFLICT BETWEEN THE GEORGIA SUPREME COURT AND THE FIFTH CIRCUIT COURT OF APPEALS PERTAINING TO THE SUFFICIENCY OF SENTENCING INSTRUCTIONS IN GEORGIA DEATH PENALTY CASES.

In light of the recent Fifth Circuit Court of Appeals decision in Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981) [rehng. en banc applied for, November 30, 1981][5/] which conflicts with numerous Georgia Supreme Court decisions pertaining to the sufficiency of the jury instructions on mitigating circumstances which have been given during the sentencing phase of death penalty cases, Respondent respectfully submits that certiorari should be granted solely on the question of whether Petitioner's constitutional rights have been violated by the trial court's instructions or failure to instruct on the role of mitigating circumstances and the jury's authorization to consider same in its decision on sentencing. The decision of the Fifth Circuit Court of Appeals in Spivey v. Zant, supra, is of prime importance to this case,

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5/ The Eleventh Circuit has held that decisions of the Fifth Circuit Court of Appeals, as that Court existed on September 30, 1981, will be precedent for Eleventh Circuit Court of Appeals cases, district court cases and bankruptcy court cases in the Eleventh Circuit. Although Spivey v. Zant, was decided on November 16, 1981 it was decided by members of the court as existed on September 30, 1981, and therefore will be binding on the Eleventh Circuit Court of Appeals. Bonner v. City of Prichard, ___F.2d___ (11th Cir. Nov. 3, 1981).

because both the sentencing instructions in Spivey and in Petitioner's case are quite similar. In Spivey the following, pertinent instructions were given by the trial court during the sentencing phase of Spivey's trial:

> "Ladies and Gentlemen, you have found the defendant guilty of the offense of murder. It is now your duty to determine, within the limits prescribed by law, the penalty that shall be imposed as punishment for that offense. In reaching this determination you are authorized to consider all of the evidence received by you in open court, in both phases of the trial. You are authorized to consider all of the facts and circumstances of the case.
>
> Under the laws of this State, every person guilty of the offense of murder, shall be punished by life in the penitentiary, or death by electrocution." Spivey v. Zant, supra, 661 F.2d at p. 468.

The Court then went on to instruct on statutory aggravating circumstances, and charged the jury that before it could inflict the death penatly it was necessary to designate the statutory aggravating circumstance which was found beyond a reasonable doubt. The court also instructed that if a statutory aggravating circumstance was found to exist, the jury was to indicate so in writing and determine whether or not to impose the death penatly by giving one of two verdicts: "We the jury recommend the death penalty," or "We the jury do not recommend the death penalty." (Id.).

The Fifth Circuit Court of Appeals panel recognized that the instructions by the Georgia trial court did not preclude the jury from considering a wide range of mitigating factors, and said nothing which would have limited the range of mitigating circumstances. Spivey v. Zant, supra, 661 F.2d at p. 470. However, the court further concluded that the instructions in Spivey did not sufficiently guide and focus the jury's consideration on the question of mitigating circumstances, and did not describe the nature and function of mitigating circumstances. Id., 661 F.2d at p. 472. In contrast, reviewing the same sentencing instructions, the Georgia Supreme Court in Spivey v. State, 241 Ga. 477, 246 S.E.2d 288 (1978), cert. den., 439 U.S. 1039 (1978), held that the instructions were sufficient. In approving the charge, the Georgia Supreme Court stated,

> ". . . the ultimate test is whether a reasonable juror, considering the charge as a whole, would know that he should consider all the facts and circumstances of the case as presented during both phases of the trial (which necessarily include any mitigating and aggravating facts), and then, even though he might find one or more of the statutory aggravating circumstances to exist, would know that he might recommend life imprisonment." Id., 241 Ga. at p. 481.

The Georgia court then went on to note that the test on the sufficiency of the instructions was substantive, requiring review of the instructions in the context of the overall charge. Id.

As noted previously, the jury instructions in Petitioner Morgan's case, are quite similar to those which were given in Spivey. The trial judge instructed as follows:

> "Now ladies and gentlemen of the jury, you having found the defendant guilty of murder, and armed robbery, and kidnapping, the Court will impose sentence with reference to the armed robbery and kidnapping, but you having found the defendant guilty of the offense of murder, it is now your duty to determine within the limits prescribed by law the penalty that shall be imposed as punishment for that offense. In reaching this determination, you should consider all of the evidence received by you in open court in both phases of the trial. You should consider all of the facts and circumstances of the case, including any mitigating or aggravating circumstances.
>
> Under the laws of this State, every person guilty of the offense of murder shall be punished by death by electrocution, or by life in the penitentiary. In the event that your verdict is life imprisonment, the punishment the defendant would receive would be imprisonment in the penitentiary for and during the remainder of his natural life. If that be your verdict, you would add, following the verdict already found by you, an additional verdict as follows:

We fix his punishment as life imprisonment for the offense of murder, to be served concurrently or consecutively with any other sentence, as you may determine. You may, however, if you see fit and if such be your verdict, fix his punishment as death, which would require a sentence by the Court of death by electrocution. If that be your verdict, you would add following the verdict already found by you an additional verdict as follows: We recommend his punishment as death for the offense or murder.

I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution for the offense of murder, you must find upon the evidence statutory aggravating circumstance or circumstances sufficient to authorize such penalty.

I charge you that a finding of statutory aggravating circumstance or circumstances shall only be based upon evidence convincing your minds beyond a reasonable doubt -- and reasonable doubt has previously been defined in the first phase of the trial -- as to the existence of one or more of the following factual conditions, in connection with the defendant's perpetration of the offense for which you found him guilty. With respect to the offense of murder, they are: The offense of murder was committed while the offender was engaged in the commission of another capital

felony, armed robbery; or the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, or depravity of mind, or an aggravated battery to the victim. Now, an aggravated battery is when one maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring him, his body, or a member thereof; or that the offender committed the offense of murder for the purpose of receiving money.

The statutory aggravating circumstance or circumstances that you are authorized to consider will be submitted to you in writing for your deliberations. You must designate in writing in your verdict on the indictment the aggravating circumstance or circumstances which you find to have existed with respect to the offense for which you recommend the death penalty.

Your verdict respecting punishment must be agreed to by all twelve of you.

Now, you may retire to begin your deliberations -- but don't begin your deliberations until the bailiff brings you the indictment with your verdict of guilty on it, along with the written statutory aggravating circumstances which you may consider.

Your may retire." (T. 229-231).

In affirming Petitioner's case on direct appeal, the Georgia Supreme Court relied directly and solely on Spivey. Morgan v. State, supra, 241 Ga. at p. 488. In fact, the Spivey decision has been of utmost importance in Georgia death penalty cases, being cited with approval in death penalty cases at least 32 times since it was decided in 1978. The decision in Spivey v. Zant, supra, may also affect numerous other Georgia death penalty cases decided prior to the Georgia Supreme Court's decision in Spivey v. State, supra.

Petitioner submits that the Fifth Circuit decision, in Spivey v. Zant, demands more than this Court and the Constitution require, notwithstanding the severity of the punishment to be imposed. It is not required that any certain litany of words be used in appraising the jury that it should consider mitigating circumstances. In Jurek v. Texas, 428 U.S. 262 (1976), the Texas jury never heard the phrase, "mitigating circumstances," nor did it ever receive a definition of the same.

As the Georgia Supreme Court has correctly noted, the delineation of some factors by the trial court, which could have constituted mitigating circumstances, may tend to overemphasize those factors, thus evading the jury's inherent prerogative to consider anything as mitigating. Collier v. State, 244 Ga. 553, 568-69, 261 S.E.2d 364 (1979), cert. den., 445 U.S. 946 (1980).

This Court has previously expounded upon the requirement that the sentencer's discretion be guided in death penalty

cases. In analyzing this requirement, the test to be applied, as enunciated in Godfrey v. Georgia, 446 U.S. 420 (1980) is:

> "'[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" Citing, Gregg v. Georgia, 428 U.S. 153, 159 (1976).
>
> "A capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.' Id., at 188, 96 S.Ct. at 2932, quoting Furman v. Georgia, supra, 408 U.S., at 313, 92 S.Ct., at 2763 (WHITE, J. concurring).
>
> This means that . . . a state . . . must channel the sentencer's discretion by 'clear and objective standards' and provide a 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" (Citations and footnotes omitted). Godfrey v. Georgia, 100 S.Ct. at p. 1764-65.

Under the Georgia statutory scheme for the death penalty, as approved in Gregg, supra, the jury may recommend a life sentence even though no or very few mitigating factors are shown. It may consider anything that it finds proper in mitigation, and may render a verdict of life imprisonment although it attaches little or no weight to the evidence offered in mitigation. There is no balancing test under the Georgia

statutory scheme. To hold that the Court must specifically address mitigating factors may cause the jury to overemphasize those listed, or may be construed as requiring the jury to specifically weigh mitigating factors against statutory aggravating factors in fixing a punishment at death, even though the Georgia statute and the scheme it codifies permits the jury to fix a punishment at "life imprisonment" even though no mitigating circumstances are found. This danger is real as is evidenced by the recent decision in Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981) where the Court found reversible error during the sentencing phase of the defendant's trial, when the trial court instructed the jury that in determining whether it would impose the death penalty it could consider two specific mitigating circumstances. Although the trial court had referred to the word "only" when instructing the jury that it could consider certain specific aggravating circumstances, and omitted the word "only" when instructing on the mitigating circumstances set out; nevertheless, the appeals court found that a reasonable juror may have interpreted the court's instructions as indicating that the jury was limited to the two specific mitigating circumstances. This case underlines Respondent's argument, and the Georgia Supreme Court's concern that if specific mitigating circumstances are outlined, death penalty petitioners will be quick to argue that the court's enunciation of same may limit the jury's discretion in considering other matters in addition to the examples given.

In conclusion, in order to alleviate the conflicting opinions between the Georgia Supreme Court and the Fifth and Eleventh Circuit Court of Appeals, pertaining to the sufficiency of sentencing instructions on mitigating circumstances in death penatly cases, Respondent submits that certiorari should

be granted, but only as to the question pertaining to the sufficiency of the trial court's instructions on mitigating circumstances.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests this Court to grant certiorari only on the issue of the sufficiency of the sentencing instructions at Petitioner's trial, and to deny the writ of certiorari on the remainder of the issues raised by Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nicholas G. Dumich, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this date served a true and correct copy of this Brief for Respondent in Opposition upon counsel for Petitioner, by depositing a copy of same in the United States mail, with adequate postage attached thereto, and properly addressed to:

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This 22nd day of December, 1981.

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Petitioner's Reply Brief

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No. 81-5741

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ALPHONSO MORGAN,

Petitioner,

-against-

CHARLES MONTGOMERY, WARDEN,
GEORGIA STATE PRISON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

REPLY BRIEF FOR THE PETITIONER

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January 18, 1982

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No. 81-5741

In The

Supreme Court of the United States

October Term, 1981

ALPHONSO MORGAN,

Petitioner,

-against-

CHARLES MONTGOMERY, WARDEN,
GEORGIA STATE PRISON,

Respondent.

REPLY BRIEF FOR PETITIONER

The State of Georgia has joined petitioner in urging the Court to grant certiorari with respect to the fourth question presented by the Petition (Brief at 26-35). The Court should grant certiorari not only with respect to the fourth question, but with respect to all questions presented by the Petition.

I. THE COURT SHOULD GRANT THE REQUEST OF BOTH PETITIONER AND RESPONDENT THAT A WRIT OF CERTIORARI ISSUE WITH RESPECT TO THE FOURTH QUESTION PRESENTED BY THE PETITION.

Rule 17(1) of this Court provides that a writ of certiorari "will be granted only when there are special and important reasons therefor". Among "the reasons that will be considered" is the fact that a Federal Court of Appeals "has decided a federal question in a way in conflict with a state court of last resort".

On November 16, 1981, the United States Court of Appeals for the Fifth Circuit held, in Spivey v. Zant, 661 F.2d 464, that the jury instructions reviewed and found

adequate by the Supreme Court of Georgia in Spivey v. State, 241 Ga. 477, 246 S.E.2d 288 (1978), were inadequate as a matter of constitutional law.* As respondent recognizes (at 32), in reviewing the virtually identical jury instructions in petitioner's case and affirming the death sentence imposed upon petitioner, "the Georgia Supreme Court relied directly and solely on Spivey". (A.57)

The Petition before this Court directly raises (at 29, 33-34) the constitutionality of the Spivey standard. For the reasons set forth in the Petition (at 24-32), and since the circumstances set forth in Rule 17(1) clearly are present, certiorari should be granted.

II. CERTIORARI SHOULD BE GRANTED NOT ONLY ON THE FOURTH QUESTION BUT ON ALL QUESTIONS PRESENTED BY THE PETITION.

Although the State of Georgia joins in urging that certiorari be granted on the fourth question presented, it opposes certiorari on the other questions presented by the Petition. We make several brief points in reply, the most important of which is that respondent does not attempt to refute, and cannot refute, the fact that not one single word was written or uttered before the Georgia Supreme Court in support of petitioner's life during mandatory appeal of his sentence.

A. The Court Should Ignore Respondent's Attempts to Create Prejudice By Suggesting That Petitioner Is Guilty of Crimes Other Than The One For Which He Was Convicted.

Respondent has made a patent effort to misdirect

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* We became aware of the decision in Spivey v. Zant on the day after the petition in this action was filed. We immediately wrote to respondent's counsel to urge that, for the reasons set forth herein, the State join petitioner in requesting certiorari.

this Court's attention by suggesting that petitioner is guilty of crimes other than the one for which he was tried and convicted. Unfortunately, this effort cannot remain unanswered.

There is no question that Jose High and Judson Ruffin (petitioner's coindictees) were implicated in other crimes. Indeed, High and Ruffin were tried and convicted for a kidnap-murder in which petitioner never was implicated. See High v. State, 247 Ga. 289, 276 S.E.2d 5 (1981); Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472 (1979); Brown v. State, 247 Ga. 298, 275 S.E.2d 52 (1981). High also was implicated by an eyewitness in a kidnap-rape. See State v. High, 145 Ga. App. 772, 244 S.E.2d 888 (Ga. Ct. App. 1978). These apparently were the other crimes to which state investigator Ingram referred in testimony at petitioner's trial. See Ruffin v. State, 252 S.E.2d at 474, 476, and Brown v. State, 275 S.E.2d at 56, where Ingram's involvement in the investigation of the other crimes is described. It should be noted, moreover, that the crime for which High and Ruffin--but not petitioner--were indicted, tried and convicted was very similar to and occurred before the crime for which petitioner was convicted.

These facts are consistent with the theory that petitioner--a youth of 17 or 18 at the time--became involved with the experienced High and Ruffin and, when he attempted to avoid committing murder, was coerced by High under threat of death to shoot the victim. That High and Ruffin may have told investigators that petitioner--an unwilling participant in the Gray murder--was involved in other crimes is not inconsistent with this theory.

Respondent's attempts to distract the Court from

the constitutional issues presented by the Petition should be ignored.

B. Respondent Admits All the Relevant Facts with Respect to the Denial of Counsel and the Right To Be Heard. Its Arguments in Opposition to Certiorari on that Issue Are Meritless.

The State admits (at 11-13) that petitioner filed his own notice of appeal; that petitioner's state-appointed counsel had to be ordered by the Georgia Supreme Court to file, first, an enumeration of error and, then, a brief; that counsel did not appear for oral argument; that the Georgia Supreme Court asked for and received a supplemental brief from the State but not from the petitioner; and that the trial judge's report, stating that there was no evidence of mitigating circumstances in petitioner's case, was received by the state court long after briefing and argument. The 11-page brief submitted by petitioner's state-appointed counsel (A.95), which represents the only words written or spoker on petitioner's behalf, did not address the issue of the death sentence imposed upon him.

While respondent notes (at 12) that the "omissions" of petitioner's counsel "certainly should not be condoned", it argues nevertheless that they do not constitute a deprivation of constitutional rights. Respondent does not address at all the "omissions" committed by the state court in hearing ex parte argument, soliciting an ex parte brief and receiving the late report from the trial judge without granting petitioner or his counsel an opportunity to see and respond to it.

In support of its proposition that there was no deprivation of constitutional rights, the State offers

three arguments. First, it suggests (at 9) that "there is no constitutional right to appeal". Second, it suggests (at 12) that rules in effect at the time did not require petitioner's state-appointed counsel to appear for oral argument. And, third, it suggests (at 12) that the "omissions" in the representation of petitioner were "at most harmless".

Respondent overlooks that this is a capital case. The accused in a capital case is entitled to an "effective appointment" of counsel and "the guiding hand of counsel at every step in the proceedings against him", Powell v. Alabama, 287 U.S. 45, 68-69, 71 (1932) (emphasis added). The mandatory review of death sentences by the state supreme court under the Georgia capital sentencing scheme is not only a "step in the proceedings" against the accused; it is a constitutionally vital step, Gregg v. Georgia, 428 U.S. 153, 198, 201 (1976) (plurality opinion); id. 222-23 (opinion of Mr. Justice White); Godfrey v. Georgia, 446 U.S. at 445-46 (opinion of Mr. Justice White). As this Court consistently has held, moreover, "there is a significant constitutional difference between the death penalty and lesser punishments", Beck v. Alabama, 447 U.S. 625, 637 (1980). A higher standard of procedural care must be observed in capital cases. Thus, the questions whether there is a general right to appeal or whether the State's own rules generally required appointed counsel to appear for argument are quite irrelevant.

The State does not attempt to refute, and indeed cannot refute, the fact that the Georgia Supreme Court heard an ex parte argument, and asked for and received an ex parte supplemental brief on the adequacy of the trial court's jury instructions. In an argument that defies logic, the State suggests (at 12) that there was no harm in this because the

Georgia Supreme Court held against petitioner on the issue that it asked the State to brief ex parte--the same issue that the State now correctly urges this Court to review on certiorari (see Point I supra). If the issue is sufficiently important that this Court should consider it, it was sufficiently important that the condemned man's state-appointed counsel should have spoken to it.

Respondent's arguments (at 13) with respect to the trial judge's report simply miss the point. The deprivation of right occurred because (i) the report was filed long after the time required by the statute and long after briefing and argument, thus depriving petitioner of the normal opportunity to review the report as part of the record and respond to it; (ii) petitioner was not told when the report was filed late, or given any opportunity to respond to it; and (iii) the report erroneously represented to the state court that there was no evidence of mitigating circumstances in petitioner's case.

Thus, with respect to the existence of mitigating circumstances and the imposition of the death sentence (i) no one briefed or argued the question on petitioner's behalf, and in fact, not one single word was written or spoken in defense of petitioner's life; (ii) the State argued and submitted an ex parte brief; and (iii) the trial judge submitted an unchallenged report that misrepresented the record with respect to the existence of mitigating circumstances. Moreover, since the arguments of counsel at trial were not transcribed, the record on appeal contained nothing suggesting that there were in fact mitigating circumstances to consider in petitioner's case.*

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* Of course, there is no way of knowing whether petitioner's state-appointed trial counsel actually brought the miti-

C. Respondent Ignores the Crucial Factors Demonstrating that Petitioner's Custodial Statements Should Not Have Been Admitted Into Evidence.

First, the trial judge flatly refused, despite requests by counsel, to rule on the legality of petitioner's arrest, in the apparent belief that his finding that petitioner's custodial statements were voluntary was sufficient to support their admissibility (Trial Tr. 122-23). But this Court has held that the mere finding that post arrest statements are voluntary cannot dissipate the taint of an unlawful arrest, Brown v. Illinois, 422 U.S. 590, 604 (1975).

Second, the testimony at trial was that the police had petitioner's home "completely surrounded" and, thus, had sufficient time to test their right to arrest before a neutral magistrate, Coolidge v. New Hampshire, 403 U.S. 443 (1971). The circumstances were not exigent. There was "a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest", prohibited by the Fourth and Fourteenth Amendments, Payton v. New York, 445 U.S. 573, 576 (1980).

Third, respondent's suggestion (at 17-18) that the procedural defects in the hearing on voluntariness before the trial court could have been remedied by petitioner's counsel ignores the fact that petitioner was represented by state-appointed counsel who later had to be ordered to file an

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gating circumstances in petitioner's case to the jury's attention. Respondent speculates (at 11) that "Attorney Nicholson's closing arguments, presenting mitigating factors, must have been based on evidence which was presented at trial". It is precisely this need to speculate about what may or may not have been said, in a case where a man has been condemned to death, that makes the failure to transcribe the arguments of both defense counsel and the prosecutor a deprivation of constitutional right. (See the Petition at 37-39.)

enumeration of error and brief, and failed to appear for oral argument of the case after his client had been condemned to death.

D. Respondent Has Failed To Distinguish Petitioner's Case From the Virtually Identical Case of Godfrey v. Georgia.

Respondent suggests (at 20) that the decision in Godfrey v. Georgia, 446 U.S. 420 (1980), turned on the fact that the jury there stated that the murder in question had been "outrageously or wantonly vile, horrible or inhuman". By implication, respondent argues that Godfrey would have been decided differently if the jury had recited verbatim the full text of Ga. Code Ann. § 27-2534.1(b)(7), as did the jury in petitioner's case (A.67). But the decision in Godfrey did not turn on the form of the verdict. It turned on the adequacy of the sentencing instructions, with this Court holding, 446 U.S. at 429, that the instructions

> "gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms."

The simple and critical fact here is that the charge on § (b)(7) in petitioner's case was virtually identical to that considered in Godfrey (see the Petition at 20).

In the face of this, respondent argues (at 21) that "because of the simplicity of the terms utilized within the § (b)(7) aggravating circumstance, it was not necessary for the trial court to define those terms". We have two responses to that argument. First, when the trial judge, in his report to the Georgia Supreme Court, was asked to describe "the extent of harm or torture" to the victim, he answered simply: "Death" (A.115). Compare Godfrey v. Georgia, 446 U.S. at 426. The fact that the trial judge himself labored under the

misapprehension that death itself could constitute "torture" within the meaning of the § (b)(7) aggravating circumstance contradicts respondent's argument that all the terms in § (b)(7) are simple, and further demonstrates that the holding in Godfrey was correct. Second, respondent's argument amounts to nothing more than a suggestion that the holding of Godfrey be rejected. That argument, coming from the State of Georgia, further demonstrates the importance of granting certiorari in this case.

Respondent also argues (at 22) that the Georgia Supreme Court engaged in the mandatory review that this Court found constitutionally vital in Gregg v. Georgia, 428 U.S. 153, 201 (1976), and (at 20) that "the record as reviewed by the Georgia Supreme Court, demonstrated ample evidence" to meet the requirements of § (b)(7). Given the deficiency of the trial court's sentencing instructions, the argument is irrelevant. Petitioner was constitutionally entitled to have a properly instructed jury decide whether he should be punished with death. Analysis of the record on direct appeal or collateral review cannot cure the trial court's failure to instruct the jury properly. (See the Petition at 23-24.)

In any case, however, respondent ignores the fact that the Georgia Supreme Court's "review" of the verdict in petitioner's case was as perfunctory--and therefore, as constitutionally inadequate--as that in Godfrey, 446 U.S. at 427. The Georgia court in petitioner's case held simply that the § (b)(7) aggravating circumstance was "supported by the evidence", with no further discussion (A.58). In Godfrey this Court explicitly held that such a "review" is constitutionally inadequate. Thus, even if it were possible for appellate review to cure defects in jury instructions,

the unconstitutional imposition of capital punishment in petitioner's case, as in Godfrey, was "in no way cured by the affirmance" of the sentence by the state supreme court, 446 U.S. at 429.

Finally, respondent's characterizations of the record of petitioner's trial (at 20-22) are not accurate.

Whether or not the record shows "mental torture" of the victim, there is not one word of evidence indicating that petitioner inflicted such torture. Moreover, respondent refers with no specificity to "facts" demonstrating petitioner's "depravity of mind". But there are no such "facts". What we stated in the Petition (at 22) bears repeating here. The only evidence that implicated petitioner was his own statements. Those statements indicated that petitioner (i) was forced to shoot at the victim under threat of being murdered himself, (ii) cried when he saw the victim shot in the head by Ruffin and (iii) was told that he was "a grown man now" and that he and his family would be killed if he went to the police. Thus, the record contradicts respondent's characterization of "the facts".

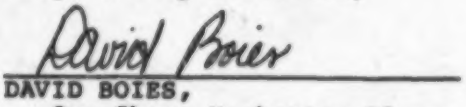
Respondent speculates (at 13) that "the jury who heard the evidence" concluded that petitioner's statement that he was under duress at the time of the crime "was unbelievable". There is no basis for such speculation. The jury explicitly was instructed that duress was not a defense to the crime of murder, and thus, even if it found petitioner's story credible, was obligated to convict him. The jury never was told, however, that evidence of duress could be considered in mitigation. Indeed, the constitutional vice in this case is that the jury was given no guidance on how to weigh evidence--mitigating as well as

aggravating, and concerning the defendant as well as the crime--in deciding whether to punish by death.

CONCLUSION

For the reasons set forth herein, and in the Petition, a Writ of Certiorari should issue, not only with respect to the question on which petitioner and respondent agree, but also with respect to the other questions presented in the Petition.

Respectfully submitted,



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January 18, 1982

I hereby certify that on this 18th day of January, 1982, copies of this Reply Brief for Petitioner were mailed, postage prepaid, to Nicholas G. Dumich, Esq., 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334. I further certify that all parties required to be served have been served.

David Bower

Counsel for Petitioner